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ABSTRACT

The document outlines a semester-long 12th grade study of criminal law which is accomplished through an examination of Wisconsin and constitutional law. Six sections comprise the teaching outline. Section I, The Legislative Process, considers the legislature, various statutes and terminologies, revision of legislation, and penalties. Section II, the major part of the course, investigates police actions, court control of police conduct, structure of the courts, search and seizure, and confessions. Section III covers the role of the prosecutor and defense counsel and plea bargaining. Section IV focuses on the courts and Section V on aspects of sentencing such as bail, types of sentences, prison, parole, and capital punishment. Section VI is comprised of course evaluation and review. Activities for each section include simulations, role playing, lecture/discussions, small and large group activities, audiovisual materials, and the use of community resources. The appendices form the major part of the document. Included are a flow chart of the criminal justice system, a pretest, suggested activities for watching television crime shows, a summary of the game, Police Patrol, newspaper accounts of mistaken drug raids, and a copy of a search warrant. Also, texts of two Wisconsin trials and scripts for two mock trials are provided. (KC)

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CRIME AND THE LAW

A 12th Grade Social Studies Course

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SO 012 184

Waukesha High School - South Campus

1977-78

CRIME AND THE LAW

"Crime and the Law" is a social studies elective offered at the 12th grade level. The course is designed to enable students to develop concepts and attitudes concerning the Criminal Justice System. The focus of the course is a study of criminal law which is accomplished through examination of Wisconsin and Constitutional law.

This course integrates many social studies disciplines such as History, Political Science, Sociology and Economics. The unit on search and seizure begins with an examination of the historical background that led to the development of the constitutional safeguards contained in the Bill of Rights. Analysis is then made of landmark cases which relate to the 4th and 5th Amendments leading to a development of Political Science skills. Throughout the unit, attention is given to the delicate balance which exists between individual and societal rights. Finally, the economic ramifications of any court decision must be taken into consideration. This effort at subject integration takes place throughout the course.

"Crime and the Law" utilizes many styles of learning. These include simulations and role playing, lecture/discussions, small and large group activities as well as a wide range of audio-visual materials. The use of community resources, such as local law enforcement personnel, truly enhances the impact of the course. A primary key to the success of "Crime and the Law" is the active participation of a local attorney who fulfills a teaching and advisory role.

This course outline is designed to provide the basis for a semester course in criminal law. It may also be used to develop specific units which could be integrated into various social studies course offerings.

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Bulletin No. 0082

CONCEPTS	GENERALIZATIONS	ISSUES	PROCESSES
I. The Legislative Process 1. Jurisdiction	1. Most crimes come under the jurisdiction of the state. 2. Only the legislature can create a crime.	1. Court reform 2. Judicial activism	Analyzing Drafting legislation Critiquing Note-taking Oral presentation Discussion (small and large groups) Comparing/contrasting
2. Legislation	1. The drafting of proper legislation entails much complexity. 2. Laws must be broad enough to catch law breakers, yet not so broad as to entrap the innocent. 3. There are many incongruities in the law.	1. Revision of legislation 2. Calibre of legislators 3. Public apathy 4. Appropriateness of penalties	
II. Police Aspects 1. Law enforcement	1. There are many misconceptions about the role of police officers. 2. Police must respond to many and varied situations. 3. Community awareness improves the quality of law enforcement.	1. Police morale 2. Community interest 3. Police training 4. Impact of T.V.	Categorizing Analyzing Theorizing Role-playing Discussion Note-taking Situational evaluatio Integration
2. Detection	1. Many crimes go undetected 2. Many factors influence police investigation of criminal activity	1. Police funding 2. Police-community relations	
III. Court Controls of Police Conduct 1. Control	1. Without controls we could evolve into a police state. 2. Constitutional safeguards are designed to control police conduct. 3. There are various methods to control police conduct.	1. Societal protection vs. individual rights 2. Need for constitutional safeguards	Analyzing Categorizing Theorizing Role-playing Discussion Note-taking Situational evalution Integration
2. Exclusionary rule	1. The primary control of police conduct is through use of the exclusionary rule.		

CONCEPTS	GENERALIZATIONS	ISSUES	PROCESSES
IV. Structure of the Courts 1. Dual jurisdiction	1. Criminal matters may be dealt with in either state or federal courts.	1. Judicial fairness 2. Validity of the appellate process	Analyzing Drafting legislation Critiquing Note-taking Oral presentation Discussion Comparing/contrasting Relating to continuum
2. Appeal	1. Reversible errors are found in the appellate process.		
3. Reasonableness	1. The ultimate question before a court concerns reasonableness.		
V. Search and Seizure 1. Burden of proof	1. The burden of proof shifts in warrant and warrantless searches.	1. Police power vs. 4th Amendment safeguards 2. Admissibility of evidence	Analyzing Drafting legislation Critiquing Note-taking Oral presentation Discussion Comparing/contrasting Analysis of case law Use of diagrams
2. Search warrants	1. The search warrant is constitutionally defined. 2. Searches may be conducted without a warrant.		
VI. Confessions 1. Interrogation	1. It is important when being interrogated to understand the 5th and 6th Amendment safeguards. 2. The validity of a confession revolves about the question of voluntariness. 3. The landmark decision concerning confessions is the Miranda decision.	1. Changes in interpretation of the Miranda decision	Analyzing Drafting legislation Critiquing Note-taking Oral presentation Discussion Comparing/contrasting Role playing
VII. Role of Prosecutor and Defense Attorney 1. Adversary system	1. The primary obligation of the prosecutor is to society and the interests of justice. 2. The primary obligation of the defense attorney is to limit the exposure of his/her client.	1. Cumbersome aspects of and adequacy of adversary system 2. Plea bargaining 3. Ethical considerations in legal system	Analyzing Drafting legislation Critiquing Note-taking Oral presentation Discussion Comparing/contrasting Listening to speaker Questioning

CONCEPTS	GENERALIZATIONS	ISSUES	PROCESSES
VIII. The Courts 1. Trier of fact	1. There is a difference between the preliminary hearing and trial in regard to burden of proof and outcome. 2. Most criminal cases are tried before a jury.	1. Duration of criminal justice process 2. Inequities in trial system	Analyzing Drafting legislation Critiquing Note-taking Oral presentation Discussion Comparing/contrasting Viewing films Mock trial
IX. Sentencing 1. Bail	1. Many criteria determine the granting of bail.	1. Equity of bail	Analyzing Drafting legislation Critiquing Note-taking Oral presentation Discussion Comparing/contrasting Debate
2. Sentencing	1. Sentences can be categorized as custodial and non-custodial. 2. Sentencing seeks to achieve certain goals. 3. There is much controversy concerning the use of capital punishment.	1. Inequity in sentencing 2. Prison/parole reform 3. Death penalty	

CRIME AND THE LAW

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TEACHING OUTLINE

CRIME AND THE LAW COURSE

GENERAL INTRODUCTION TO COURSE

1. Give overview of the course

   a. The Legislative Process (approximately 2 1/2 weeks)

   b. Police Aspects (approximately 8 weeks)

   c. Role of the Prosecutor and Defense Counsel (2 weeks)

   d. The Courts (2 weeks)

   e. Sentencing (3 weeks)

   f. Summary and Review (1/2 week)

2. Present flow chart - see Appendix 1

3. Give pre-test - see Appendix 2

I. THE LEGISLATIVE PROCESS (approximately 2 1/2 weeks)

A. Introduction

1. "Crime" - prohibited activity or conduct defined by legislature - Wisconsin is unique in that only the State can impose loss of liberty as punishment (not so for county or city ordinance violations).

2. Where is the law? - statutes
   Case law - no common law crimes (All crimes in Wisconsin are defined in the statutes.)

B. Activity: The Legislature

1. Divide the class into 5 subgroups.

2. Give each group a set of possible fact situations from which to choose one as a problem to solve.

   An example of such a set might be:

   a. Some people are killing others on purpose.

   b. Some people are handling weapons carelessly and killing others as a result.

   c. Some people are handling weapons while drunk and killing others as a result.

   d. Some people are killing themselves with help from others.

These situations should be created with reference to the following chapters of the Wisconsin Statutes.

a. Ch. 940: Crimes against life and bodily security

1) 940.01 - first degree murder

2) 940.08 - homicide by negligent use of vehicle or weapon

3) 940.09 - homicide by intoxicated use of vehicle or firearm

4) 940.12 - assisting suicide

b. Ch. 940.225: Crimes against life and bodily security (sexual assault)

1) 940.225(1) sexual assault without consent causing injury

2) 940.225(2) sexual assault without consent and by force

3) 940.225(3) & (4) sexual assault without consent

c. Ch. 943: Crimes against property

1) 943.10 - burglary

2) 943.20 - theft

3) 943.23 - operating vehicle without owner's consent

4) 943.32 - robbery

5) 943.50 - shoplifting

d. Ch. 944: Crimes against sexual morality

1) 944.16 - adultery

2) 944.2(- unmarried people are living together

3) 944.23 - making lewd or obscene drawings

e. Ch. 946: Crimes against goverment and its administration

1) 946.01 - treason against the state

2) 946.05 - flag desecration

3) 946.31 - perjury

4) 946.41 - obstructing an officer

f. Ch. 947: Crimes against public peace

1) 947.01 - disorderly conduct

2) 947.02 - cruelty to animals

3) 947.045 - drinking on highways

3. Instruct the group to try to solve the chosen problem by drafting a law prohibiting the objectionable conduct. The law must define what is prohibited and must establish the penalty for violation of the law.

Note: Groups should be given one full workday for this project.

Guidelines for students drafting laws:

Each law must have:

a. Subject (whoever)

b. Adverb (e.g. intentionally, willfully)

c. Action word or verb (e.g. kills)

d. Object (e.g. life of another)

e. Penalty

4. Reports: Each group hands in a written report of its law including the definition and the penalty.

Note: By collecting reports, you prevent groups from "adjusting" their laws after reviewing the appropriate legislation.

5. Critique student legislation.

a. Each group compares and contrasts its own legislation with the actual statute.

1) Elements of the law

2) Penalties

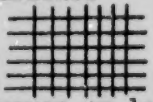
b. Hopefully, students will recognize the need for specificity (broad enough to avoid "loopholes"; narrow enough to catch ONLY criminals).

c. General discussion

1) Are there better ways to draft laws?

2) Should there be more or fewer lawyers in the legislature?

d. Summary experience

1) Diagram  "The Net of the Law"

2) Finely woven or loosely woven net?

6. Activity: The Legislature (for more interested students)

   Assignment: Student is assigned to the actual Wisconsin Statute dealing with the problem which he/she sought to prohibit; he/she shall note the elements and penalties for the actual crime and then prepare a written report for use next class session.

   Note: Can also be used as a small group exercise

C. Overview of various statutes and terminologies

1. Terminology

   a. Probable cause

   b. Beyond a reasonable doubt

   c. Indict

   d. Elements of the law

   e. Burden of proof

   Note: The above terms can be explained using the first degree murder statute #940.01.

2. Disorderly conduct (947.01)

   a. Examine law and its elements.

   b. Question: Is this statute overbroad? (constitutionally) (Wis. Supreme Court has said no.)

   c. Emphasize catch-all nature of the legal system.

   d. Broadness is useful in plea bargaining.

3. Burglary (943.10) - Robbery (943.32) - Theft (943.20)

   a. Examine elements of each.

   b. Discuss differences; compare and contrast.

   c. Discuss appropriateness of penalty; especially notice the "sliding scale" of penalties in 943.20.

D. Activity: Revision of legislation: Compare old Ch. 944 with new Ch. 940.225.

1. Students examine old Ch. 944.01, 944.02, 944.10, 944.11, 944.12 to find problems and potential legislative solutions. Students are then paired to compare responses. Entire class then discusses.

2. Significant areas of change (944 vs. 940.225)

a. Consent

b. Sexism

c. Victim's prior history - admissible evidence section

d. Resistance need not be proved.

e. Switch from Crimes against Sexual Morality to Crimes Against Bodily Security

E. Problems in Penalties

1. Note penalties provided for:

a. Party to crime (939.05)

b. Attempt (939.32)

2. Compare penalties for child abuse (940.201) with:

a. Dognapping (948.03 and 948.18)

b. Operating a vehicle without the owner's consent (943.23)

F. Evaluation: Quiz covering above material

II. POLICE ASPECTS (approximately 8 weeks)

A. Introduction

1. Brainstorm and discuss situations in which police might have problems (e.g. bar room brawl, family fight).

2. Create realistic police responses to above situations.

Note: Emphasis is on a <u>realistic</u> approach as opposed to T.V. portrayal.

3. Activity: Police Aspects (for more interested students)

a. View 3 full hours of "cop shows," keeping a journal similar to the following. (See appendix 3 for further ideas.)

TV CRIME SHOWS - ACTIVITY FORM

PROGRAM			
VERBAL THREAT	NOTES	NOTES	NOTES
FORCED ENTRY DOOR KICKED OPEN, ETC.			
PHYSICAL CONTACT WITHOUT WEAPON			
GUN AIMED			
GUN FIRED			
OTHER WEAPON			

From "Bill of Rights in Action", February 1977, p. 23

b. Evaluate realism of police response; be prepared to share findings and opinions with class.

4. Police Patrol Game[2]: directions, background, material, discussion questions included for this group activity; see appendix 4 for summary of one portion of game.

Note: Highly effective for sensitizing students to problems encountered by police

Note: See appendix 5 for information on police problems.

5. Activity: Detection of Crime:

a. Pair students and ask each pair to list as many crimes as possible (at least 20), then decide which might not be detected by the police and why.

b. Large group then shares and discusses lists.

1) Examples of undetected crimes

a) Rape

b) Gambling

c) Embezzlement

d) Child abuse

e) Prostitution

2) Why undetected in each instance

Note: Invite in a guest speaker regarding rape or child abuse counseling.

Note: Discussion can also focus on victim and victimless crimes.

3) Factors influencing investigation

Note: Use Fenton Inquiry method to elicit factors listed below from large group.

a) Available resources

b) Seriousness of the offense

c) Reputation and status of the victim and/or suspect

d) Pressure from groups in the community

e) Potential for solution by the criminal process

f) Concern for negative impact of enforcement

4) Which of the preceding examples are "proper" factors?

5) Which of the preceding examples are "improper" factors and why?

6. Activity: Investigation of Criminal Activity

SKIT: The Decision to Investigate

(materials adapted from Criminal Justice Administration, pp. 60-61)

a. Participants

1) complaining citizen

2) desk sergeant

b. Materials

INVESTIGATION SKIT #1

Complainant:

Well spoken gentleman calmly explains to the desk sergeant that his mail is being tampered with. Has been to the postal officials without success. Is certain that a large check was sent to him, but the check has not been received. If questioned, will state that the check was for sixty-three million dollars.

Desk Sergeant:

Collect all of the relevant facts from the complainant and make an appropriate disposition of his complaint.

INVESTIGATION SKIT #2

Complainant:

Resident of a slum neighborhood complains to sergeant that the children in the neighborhood are trespassing on the playground across the street by climbing over the fence after it's locked at 4:00 P.M. The children play basketball, baseball and such. Noise is not a problem, but the complainant knows the children are trespassing and thinks something should be done about it.

Desk Sergeant:

Collect the facts and make an appropriate disposition. What would you do if you really were the police sergeant?

INVESTIGATION SKIT #3

Complainant:

Woman complains that her boyfriend stole $2.25 from her purse while at her home. She is sure that she had the money on her dresser when he visited her and later in the evening it was gone. When she accused him, he denied it and became very angry.

Desk Sergeant:

Knows that this woman has had frequent fights with her boyfriend over money and has complained to the police several times in the course of the past year. Handle her complaint!

c. Procedure

1) Selected class members act out the skit in which the complainant outlines his/her problem to the desk sergeant.

2) Desk sergeant determines what - if anything - to do.

3) General discussion should follow.

a) Would the class have handled the complaint differently?

b) How so?

4) What about police-public relations?

B. Court Control of Police Conduct

1. Discussion: Should there be any controls on police methods of investigation and collection of evidence?

a. Consider:

1) If police could break into anywhere they wished, they could make more arrests and get more criminals behind bars.

Note: See appendix 6; article entitled "Mistaken Drug Raids Not Isolated Cases".

2) Those who have nothing to hide have no reason to fear police investigation.

3) Why shouldn't police be unlimited as to wire taps, electronic snooping, and arrests on suspicion?

b. Attempt to generate discussion on the above, drawing out rights of the innocent to privacy, right of even the guilty to privacy. Illustrate with story of Sheboygan, Wisconsin teacher who was prosecuted for living with his fiancee, and the husband and wife in Indiana who were prosecuted after being observed in an illegal sex act by police officers peeking through a kitchen window.

2. Assuming (hopefully) that we've concluded that there should be controls on the police, what choices do we have to prevent the police from doing "wrong" (whatever that is)? (Students make suggestions; place on board.)

3. Constitutional safeguards in matters of search and seizure

a. Historical background: Bill of Rights, rights of the accused with focus on the 4th Amendment

b. Relationship between 14th Amendment and the Rights of the Accused, especially 4th Amendment

c. Hand out and analyze 4th and 14th Amendments.

1) What are the constitutional rules of arrest and search and seizure?

2) Note that a warrant is not a necessity for a constitutionally proper search. Point out that the majority of searches occur without a warrant.

3) What is the central word in the 4th Amendment, i.e., what word do you suppose has caused the most difficulty and litigation? (Much of our examination of court-made rules will revolve around what is "reasonable.")

4) What makes the local police subject to the rules of the 4th Amendment? Where in the 4th Amendment are states and municipalities bound to honor the Bill of Rights? (interpretation of 14th Amendment)

ARTICLE IV - The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE XIV - No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Methods of Control of Police Conduct

a. Elicit the following controls from class:

1) Civil remedy, e.g. sue the police

2) Citizen review board, e.g. Police and Fire Commission

3) Discipline, e.g. punish offending officer

4) Self defense, e.g. vigilante action

5) Dismissal, e.g. no further prosecution

6) Exclude evidence, e.g. suppress evidence

b. Discuss and evaluate effectiveness/problems of the above; which are most equitable? Narrow discussion to dismissal of case vs. exclusion of evidence.

c. Exclusionary rule

"If evidence is improperly obtained, it must be excluded; it cannot be referred to or used at trial. This severe rule developed, as

recognized in the California case of People vs. Cahan (1965), because other rules designed to protect the accused had proved to be inadequate. Note that the result of this rule will often be the release of an accused even though he may have confessed or have surrendered incriminating evidence. In the words of Judge (later Justice) Benjamin Cardozo, 'Is the criminal to go free because the constable has blundered?' [People vs. Defore, 242 N.Y. 13, 21 (1926)]. Another problem is that the constitutional rules are complex and changeable and thus hard for police to apply to given factual situations."

---Quoted from Inquiry Instructional Materials, vol. 2, p. 220.

Note: The concept of the exclusionary rule is presented in lecture/discussion format. The teacher must provide illustrative situations as this is a pivotal concept in the development of the Search and Seizure unit.

1) "Note that even with the exclusionary rule, some police illegalities continue, as where police would rather deal with the symptom than collect evidence. For example, see the movie 'The French Connection'; or where police conduct illegal searches of persons to seize guns and get them off the street, rather than to use them in court.

2) "Also note that to some extent, the exclusionary rule has changed police testimony more than police conduct. For example, after the Mapp case, there was a reported increase of cases where, as the officer approached the defendant, the defendant removed narcotics from his pocket and threw them on the ground; and an increase of cases where the defendant supposedly consented to or invited the police to search him or his home. Perhaps, unfortunately, the exclusionary rule has had more effect on testimony than method."

---Quoted from Inquiry Instructional Materials, vol. 2, p. 221.

Note: The above is known as "dropsy."

d. This is a good point for a mid-term examination to insure understanding of concepts and terms before moving ahead to next unit.

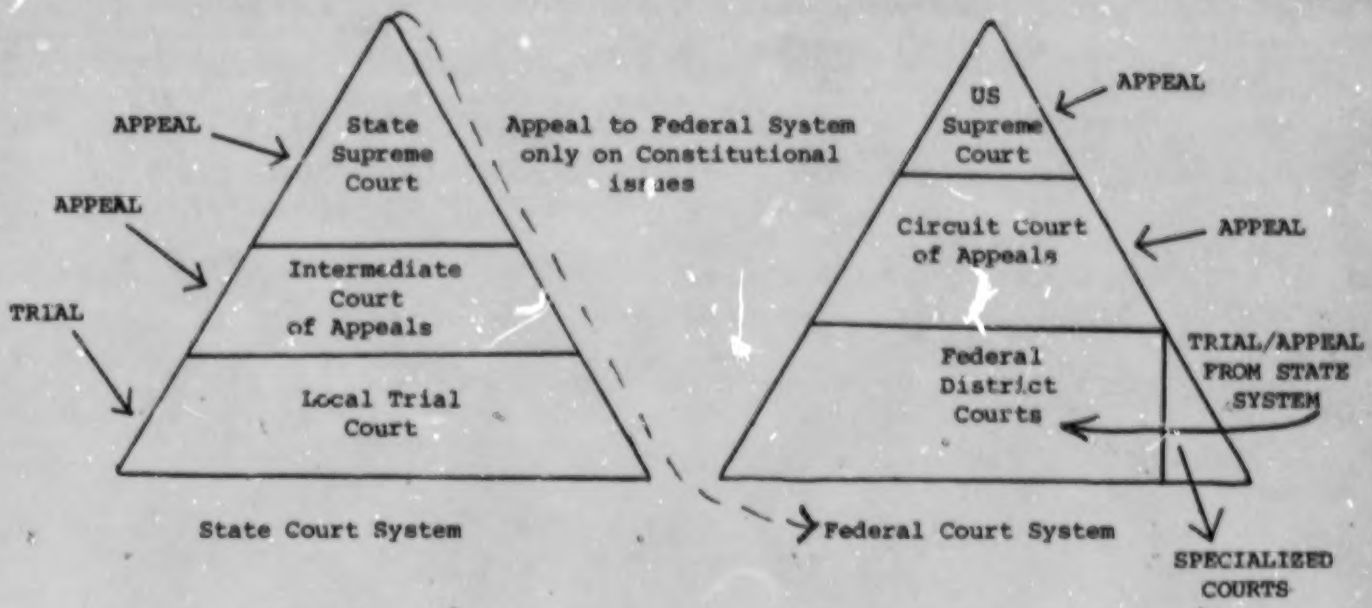
C. Structure of the Courts (state and federal)

1. Two jurisdictions - state and federal. What cases go to each level?

a. State, e.g. violation of state statutes

b. Federal, e.g. violation of federal statutes, cases arising from alleged violation of constitutional rights.

2. The U. S. and State Court systems



a. Appeals court looks for <u>reversible error</u>.

b. If appeal is upheld, accused is remanded back to trial court; he/she is not immediately set free.

c. Explain difference between unanimous opinion/majority opinion/ dissenting oppinion.

3. Continuum of Constitutionality

a. Basis is reasonableness.

b. See diagram - where will the cases in the Search and Seizure unit lie on continuum? Why?

unreasonable search ——— reasonable search

D. Search and Seizure

1. Warrant and warrantless searches

a. Search with a warrant:

1) Presumed valid

2) Burden of proof rests with the defense attorney.

b. Search without a warrant:

1) Presumed invalid

2) Burden of proof rests with the district attorney.

Note: Use of illustrative situations is crucial to aid students in understanding these presumptions and burdens of proof.

2. Search Warrants

a. What is the purpose of making the police obtain a search warrant? (It provides some measure of protection of privacy for the police to have to convince a neutral, independent person that there is reason to issue a warrant.)

b. The basic rule is set forth in State vs. Bell, 215 N.W. 2d 535 (1974): "The fundamental rule applicable to searches and seizures is that warrantless searches are per se unreasonable under the fourth amendment except under certain well-defined circumstances."

c. Note that the policy or rule is for the court to begin with the view that a search without a warrant is unreasonable, and let the DA try to convince the court that the search was, in fact, reasonable as an exception to the usual warrant requirement.

d. See appendix 7 for sample search warrant.

e. Note that the searching officer is allowed to seize property not described specifically in the warrant if the property is discovered during a lawful search [See Myers vs. State, 60 Wis. 2d 248, (1972).]

3. Warrantless searches

Under "certain circumstances", reasonable warrantless searches will be sustained. What are these circumstances?

a. Searches incident to arrest

b. Searches of a vehicle

c. Searches by consent

d. "Searches" for items in plain view

e. Inventory searches

f. Other exigent circumstances

Note: The material on warrantless searches is quite complex. It is presented primarily in a teacher-led lecture/discussion format. The lessons include guidelines for warrantless search situations. These are not hard and fast rules. Students and teachers are encouraged to apply these guidelines to real life experiences.

4. Specific Warrantless Searches

a. Searches incident to arrest

1) Searches made at the time of a valid arrest have long been held proper without a warrant.

2) Illustration: The situation below is from State vs. Dodd, 28 Wis. 2d 643 (1965).

"Facts: About 10:30 P.M. on December 8, 1962, police officers arrested Dodd in his apartment on an assault and battery warrant. In the search of his apartment that followed his arrest, marijuana was found. Dodd was prosecuted for possession of marijuana.

Question: Ask the class how many feel, at this point, that the search was unconstitutional? Why?

The penalty for possession of marijuana, a felony, was at that time a minimum of 2 years, maximum of 10 years for the first offense, 5-10 years for the second offense, and 10-20 for the third offense. Sale of marijuana to a person under 21 was penalized by 3-25 years for the first offense, 20 years to life for the second offense, mandatory life sentence for the third offense.

Question: Do these facts change the class' opinion of the search? Why?

The search took place throughout the entire apartment, including the living room, bathroom, bedroom, dining room, kitchen and closet.

Question: Does this influence the class' opinion? Why?

The marijuana was found in a knitted shirt-sweater located in the living room closet. The quantity found was two seeds.

Question: What is the class' evaluation upon all of these facts? Why?

Upon the above facts, the court concluded that the search seemed to be a general exploration for narcotics without a search warrant, and completely unrelated to the arrest for assault and battery. An arrest cannot be used as a pretext to search for evidence. The court said, 'It seems rather strange that three police officers of the narcotics division of the vice squad were necessary to arrest an ordinary citizen at 10:30 at night for a battery if that was all that was involved.' To the police argument that the search was made to protect the officers from weapons available to the defendant, the court said, 'A search for weapons would hardly include such a minute search of a pocket in a shirt as would disclose two seeds of marijuana.' The court held that the search was not reasonable because the police were engaged in a general rummaging exploration for evidence of narcotics; Dodd's conviction was overturned."

---Quoted from Inquiry Instructional Materials, vol. 2, pp. 202-203.

3) Constitutional justifications for "search incident to arrest"

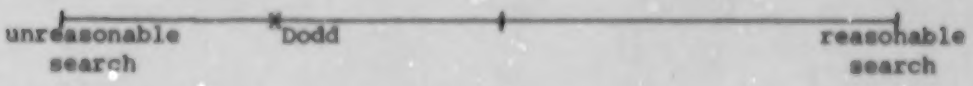
a) Protection of the officer

b) To obtain fruits of the crime

c) To obtain instruments used in the crime ("instrumentalities")

d) To obtain other contraband

4) Have the class place the Dodd case on the continuum.



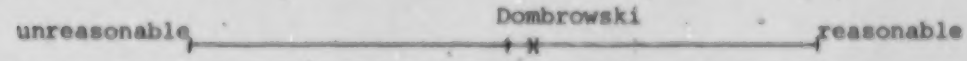
b. Searches of a vehicle

1) From Cady vs. Dombrowski, 93 S. Ct. 2523 (1973), a U. S. Supreme Court case from Wisconsin:

Whether a search and seizure is unreasonable within meaning of Fourth Amendment depends upon the facts and circumstances of each case, and searches of automobiles that are constantly movable may make search of an automobile without a warrant a reasonable one although results might be the opposite in a search of a home, a store, or other fixed piece of property.

2) In other words, because of the movable nature of automobiles, the courts allow the police more latitude in searching autos than in searching homes, apartments, etc.

3) Cady vs. Dombrowski is a good illustration of movement through the appeal process.

4) 

Note: The above case can be obtained using citations listed.

c. Searches by consent

1) For some reason, perhaps hoping to bluff their way out of trouble, suspects sometimes permit police to proceed with a search with the suspect's own consent.

2) Some frequently litigated areas of consent searches are where, for example, the keeper of a rooming house allows inspection of the tenant's room (probably a valid search); where a landlord allows the search of his tenant's apartment (probably not permitted); or where a school superintendent permits the search of a student's locker (which probably is permitted).

3) The suspect's own consent to the search waives the necessity for a warrant and makes the search per se reasonable: the search by consent is presumed reasonable.

4) It is not essential for the prosecution to show that the consenter knew of his right to refuse consent to search in order to establish that the consent was voluntary. [U.S. vs. Matlock, 350 F. 2d 261 (1965)]

5) It is the prosecution's obligation to prove that there was consent.

Note: Distinguish between informed and uninformed consent.

J. "Searches" for items in plain view

1) "A search implies a prying into hidden places for that which is concealed. It is not a search to observe what is in plain view." [Edwards vs. State, 38 Wis. 2d 332, (1967)]

2) Does this rule seem reasonable? Should/does the 4th Amendment prohibit officers from observing things in plain view?

3) Does/should the plain view doctrine prohibit officers from seizing evidence as follows?

a) Officers, standing on the front porch, look through a window and see criminal conduct [permitted: Edwards vs. State, 38 Wis. 2d 332 (1967)]

b) Officers, standing in a hallway not open to the general public, obtain evidence of defendant's criminal conduct [probably not permitted: see U.S. vs. Case, 435 F. 2d 766 (1970)]

c) Officers look into an automobile and see goods taken in a recent burglary [permitted: Day vs. State, 61 Wis. 2d 236 (1973)]

d) What if the officers used a flashlight to see what was inside? [permitted: Warrix vs. State, 50 Wis. 2d 368 (1970)]

A policeman may use a flashlight to bring into plain sight what natural light would have revealed if the "look-see" had taken place in daylight. A search implies prying into hidden places for what is hidden. The observance by sunlight or artificial light of that which is open and patent is not a search. We agree with the statement in Sweeting vs. State (1969), 5 Md. App. 623, 249 Atl. 2d 195, 198, "where an officer is in a place where he is lawfully entitled to be (as here, on a public street), the shining of a flashlight at night inside the vehicle while remaining outside does not amount to an illegal search under the fourth amendment."

e. Inventory searches

1) Where the police take items into custody, such as automobiles, they have a limited right to take an inventory of the items impounded so as to protect themselves against later claims that things were stolen during police custody.

2) Apparently, where police are able to lock a car against intruders, that is sufficient procedure, and they are not, then, to enter the vehicle and discover evidence [Soehle vs. State, 60 Wis. 2d 72 (1972). Officer locked car from inside and found concealed weapon; held, officer could and should have locked car from outside and had no justification for entering the car; evidence suppressed.]

3) If however, the car cannot be locked, the officers are justified in entering the vehicle to remove contents. [State vs. Tully, 166 Conn. 126 (1974)]

4) In any event, their entry must be reasonable under all the circumstances, and they are not permitted to conduct an unreasonable exploration once in the car [i.e., can't unlock and search suitcases found in the trunk: see State vs. McDougal, 68 Wis. 2d 399 (1974). See appendix 8.]

5) unreasonable — McDougal — reasonable

Note: State vs. McDougal is a high interest case that clearly shows how the courts rule on a warrantless search issue, i.e. inventory.

f. Other Exigent Circumstances

1) Where a specific situation is not covered by above guidelines in warrantless searches.

2) Conrad vs. State, 63 Wis. 2d 616 (1973) is a good example of exigent circumstances involving the "open fields" doctrine.

Note: A high interest case; see appendix 9 for facts and decisions by courts.

unreasonable — Conrad — reasonable

5. Summary of search and seizure law

a. This is an extremely complex area. No two cases are the same. Each case is decided on its own merits (facts). There aren't uniform and easy rules to apply, and even judges disagree on the rules.

b. As a personal guideline, I am partial to a rule announced in a dissent to the 1967 U.S. Supreme Court case of Katz vs. U.S., 389 U.S. 347 (1967). This case dealt with the government's use of an electronic wiretap on a public payphone. Evidence (taped conversations) was excluded from use in court because, as Justice Harlan stated it, Katz had a "reasonable expectation of privacy" even though the public had access to the use of the phone. Harlan suggests a two-point test:

1) Did the person exhibit an actual expectation of privacy? and,

2) Is society prepared to recognize the expectation as reasonable?

c. Lastly, consider how the complexity of search and seizure law is likely to affect the police officer. Are the police justified in viewing the Constitution, as interpreted by the courts, as mere "technicalities"?

6. A good location for a check-test on search and seizure.

E. Confessions

1. Learning Activity: Interrogation Skit (drawn from Project Inquiry Instructional Materials, vol. 2, pp. 189-90)

a. Choose 3 students: one "student", two "police officers"

b. Facts: Student has attended a rock festival and is on his way home. While walking home, he finds an apparently discarded jacket. He picks it up and puts it on. In checking through the pockets he finds a small envelope, which he opens and tastes. He is quite sure it is heroin, and changing directions away from home, he begins walking toward the house of a friend who is a known drug dealer. Just then, the police, who have been looking for a troublemaker at the concert wearing a similar jacket, arrive. They search and arrest the student, and transport him to the station for questioning. He is given his "rights" during the arrest.

c. Further fact development - At the station, the attorney takes the role of detective. Through the use of questions, the detective tries to lead the student to trap himself in conflicts; i.e. whose jacket? Know what this powder is? You were going to sell it, weren't you? If the student asks for an attorney, the detective should indicate that if the student doesn't want to "play ball" and be cooperative, then things will go harder on him. Sidetrack the student thusly: "Sure, you can call your attorney, kid. But before you do, just understand we can charge you with an attempted delivery of heroin - $12,500 fine and 7 1/2 years - a felony, kid. Or we could charge you with an attempt to distribute to a kid three years younger than you - $12,000 fine and 15 years. But if you cooperate, I'd talk to the D.A. about a simple possession - 1 year." etc. Note how the skillful detective can avoid making specific promises but gently dissuade the student from calling his attorney. Detective should attempt to gain signed confession.

[References for penalties in text:

Wisconsin Statutes

161.41(a) & 939.32

161.46 & 939.32

161.41(2r)(a)]

d. Skit review: Where, if at all, did student try to lie his way out of trouble but get in deeper? Would the student have been better off without making any statement? Should student have called his attorney right away? What should the attorney do when called? Did the student, by his statements, give the police a stronger case against him?

Note: An observation: In fairness to the police, the "detective" may overstep the bounds of proper conduct to illustrate the point in this short skit, but real detectives may sometimes overstep bounds in the interest of getting a conviction. In such situations, the student and detective are adversaries, but only one is skilled in the area.

2. 5th Amendment guarantees: "No person shall ... be compelled in any criminal case to be a witness against himself..."

a. Explanation by teacher of 5th Amendment

b. Discussion of impact/implications of 5th Amendment

1) Ideas concerning implication of guilt

2) How complete is protection (e.g. neighbor; friend)?

3) Use of privilege to save life (e.g. gang pressure)

4) Fairness of D.A. commenting on 5th Amendment privilege (recent ruling says D.A. may not comment)

5) Impact on jury (e.g. Patty Hearst, Joe McCarthy)

c. Historical background: Interrogation

Refer to some of the techniques used in the early American colonies, such as the water-dipping of suspected witches and the stringing up of suspects by the thumbs. Note that the original term "outlaw" meant that the individual, because of his accused acts, was now outside the law and beyond any of its protections, and could, therefore, be treated in any manner desired. Ask the class if any of them could withstand a "third degree" designed to get a confession, with no limits imposed on tortures used.

d. Problem of Voluntariness

1) "Courts have long held that confessions must be 'voluntary' or they will be inadmissible in court ('exclusionary rule'). The problem has been in defining 'voluntary'. What if the confession was:

a) Induced by torture

b) Induced by use of rubber hose

c) Induced by threat of use of rubber hose

d) Induced by lack of sleep or lack of food

e) Induced by fright (six officers armed to the teeth silently threatening the defendant)

f) Induced by trickery ('if you confess, no charges will be pressed.')

g) Induced by exploiting defendant's lack of knowledge of right not to talk.

2) The class may be capable of discussing the fact that this privilege cannot be invoked unless there is a reasonable basis for it, and unless the person raising it, rather than other persons, will tend to be incriminated.

During investigations, for example, by Congress or by a grand jury, a witness may be granted immunity. If he then continues to invoke the Fifth Amendment, he may be jailed for contempt. Ask the class if they think this procedure violates the spirit of the Fifth Amendment.

In view of the 'suerte', or silence of the Cosa Nostra, ask the class for comments on the technique of granting immunity to a known Mafia boss, knowing he will still not talk, and then imprisoning him on contempt.

3) Shouldn't an individual be compelled to admit that he is a member of the Communist Party or the Ku Klux Klan (or any extremist group capable of stimulating student interest on this question)?

4) A migrant worker is arrested by the local police. They bring him to the police station, book him, and take his photograph and fingerprints. They then begin to interrogate him to learn whether he was involved in shoplifting at a drugstore. Ask the class whether he is likely to sign a confession and why.

5) Where a coerced confession can be easily determined to be true and, therefore, trustworthy, such as relating to the location of hidden contraband, should the confession be allowed in court?"

---Quoted from Inquiry Instructional Materials,[4] vol. 2, pp. 207-208.

Problem: what, then, prohibits the police from forcing confessions from all in order to corroborate some?

e. Miranda Decision

1) Facts of case/arguments

2) Decision granted

a) Right to remain silent

b) Right to an attorney

c) Right to court-appointed attorney

d) Warning, anything you say can/will be used against you.

e) Right to stop questioning [State vs. Hernandez, 61 Wis. 2d 253 (1973)]

f. Illegally Obtained Confessions

The same exclusionary rule applies to the confession itself, and the "fruit of the poisonous tree" doctrine excludes evidence which results from such confessions, as it excludes evidence resulting from unconstitutional search and seizure. Note also that regardless of collateral evidence or independent proof of guilt, use at trial of an improperly obtained confession is always reversible error, never harmless.

Note: Concept of "fruit of the poisonous tree" should be stressed.

g. Limitations of 5th Amendment protection

Note that the Fifth Amendment applies only to testimonial evidence, thus voice prints, lineups, handwriting exemplars, etc., are not forbidden. Discuss Wisconsin's implied consent law.

III. ROLE OF THE PROSECUTOR AND DEFENSE COUNSEL (2 weeks)

A. Role of the Prosecutor

Note: Invite local D.A. in to speak as introduction to the following.

1. General duties:

a. Charging - the decision of what charge should be placed against a suspect

b. Negotiating guilty pleas - working with defendants, or, more commonly, their attorneys, to obtain pleas of guilty to the charges

c. Trying cases - when necessary, taking cases through trials to determine the defendant's innocence or guilt

2. Overall obligation is to fairness/justice: D.A. is the only participant so concerned.

3. Skits

Complainant-D.A. confrontations on following pages are adapted from Criminal Justice Administration,[3] pp. 440-41.

SKIT #1

Complainant: His daughter observed an old man in an alley exposing his sex organ. The father wants the man arrested and charged

for indecent exposure. The father is adamant that since the old man committed a crime, he should be punished.

D.A.: When police talked to the man, they found he was 78 years old and has no criminal record. He readily admitted the allegations, but stated he was urinating when observed and that his doctor would substantiate that he suffered from a kidney ailment.

SKIT #2

Complainant: Police officer, who recently arrested a 66-year-old man for disorderly conduct. The man was caught begging on a public street. He was found with $199 cash on him, plus a bank book showing deposits of $5700. He has long record of begging, disorderly conduct arrests, and related offenses.

D.A.: Determine disposition

SKIT #3

Complainant: Irate husband in the process of divorce. Claims that after he moved out of the house, the wife's boyfriend moved in. He claims the boyfriend is there overnight frequently. He further claims he has been to see the police, but they won't do anything because they say it's a civil matter. Complainant is familiar with 944.20(3).

D.A.: Good luck.

SKIT #4

Complainant: Owner of gas station, whose former employee unlocked the pump after closing hours and pumped ten gallons of gas into his car without consent. Wants him charged with misdemeanor theft.

D.A.: You know that defendant is 22 years old, has no prior record. You would like to see him charged with a lesser crime, like disorderly conduct.

B. Role of Defense Attorney

1. Hired gun, limited only by moral and ethical limitations; yet adversary system demands such a role. (See articles in appendix 10.)

2. Moral guilt vs. legal guilt

   a. Guilty or innocent vs. proved or not proved

   b. Object is to limit or reduce client's exposure.

3. 6th Amendment "...and shall have counsel for his defense..."

   a. Gideon vs. Wainwright, 83 S. Ct. 792, 372 U.S. 335 (1963), decision affirms right to counsel even for indigents.

   b. Sources of representation

      1) Private attorneys (retained counsel)

      2) Court-appointed attorney

      3) Public defenders

   c. Jack Ruby shows functions of counsel (clearly guilty yet guilty of what?) "Jack Ruby was seen killing Lee Harvey Oswald on national T.V. Ask the class whether they would be willing to pay for Ruby's attorney if he were indigent (i.e., through tax-supported public defender or similar program). If the class is convinced he should be easily convicted, and furnishing him counsel would only be a waste of taxpayers' money, the instructor should ask the class whether the conviction should be under 940.01, 940.02, 940.05 or possibly 940.09. This will demonstrate the importance of the accused's state of mind, and that this is an important consideration even in cut-and-dried situations."

      ---Quoted from Inquiry Instructional Materials,[4] vol. 2, p. 209.

C. Plea Bargaining

   1. Goals

      a. Prosecutor obtains conviction without trial.

      b. Economy - money/time/staff (unclogs system)

      c. Defense attorney limits client's exposure.

      d. A negotiation with client's/court's consent.

   2. Using snowmobiler shooting article attached, members of the class assume the role of defense counsel and D.A.: try to bargain a plea of guilty to a lesser charge (see appendix 11).

   3. Plea Bargaining game[5]

IV. THE COURTS (2 weeks)

A. General Discussion - The Preliminary Examination

   1. In felonies, but not in misdemeanors, the defendant is entitled to a preliminary hearing. From the procedural viewpoint, the preliminary is held so that the judge can determine whether or not there is "probable

cause" to believe that the defendant committed a felony. If so, the defendant is "bound over" for trial. If not, the defendant is released and charges are dismissed, subject to possible reprosecution.

2. From the defense attorney's point of view, the preliminary hearing has another value: the right to learn about the strength of the D.A.'s case through cross-examination of the witnesses testifying at the preliminary. Cases are rarely won at preliminary (by defendant), but frequently the defense can learn useful weaknesses in the D.A.'s case. The defense rarely calls its own witnesses at preliminary. Some defendants and their attorneys waive (give up) the right to preliminary hearings.

Note: Arrange a field trip to a preliminary; obtain consent of the judge.

B. "The Trial" film illustrating trial situation.[6]

Note: Field trip to Courthouse would fit well here.

C. Activity - Mock Trial

The mock trial of State vs. Robert Dylan, or State vs. Richard Starkey (see materials in appendices 12 and 13), is tried by student-attorneys to a jury drawn from another class. This activity is anticipated to run 4-5 days.

Note: The advice of a local attorney on framing of questions and playing the role of judge is deemed essential for success of this learning activity.

V. SENTENCING (3 weeks)

A. Bail

Note: We have found this to be the most appropriate spot to deal with the issue of bail, although it is out of logical sequence as it fits into the criminal justice system.

1. Objectives/criteria/goals/problems

2. Practical applications (e.g. Patty Hearst)

B. Sentencing

1. Goals - What should we do with those who have been convicted? What interests does society seek to serve by sentencing?

a. Retribution - "getting even"

b. Deterrence

1) Individual - deter this individual from repeating his conduct

2) General - deter all others from committing the crime

c. Rehabilitation - make the defendant a better person

d. Removal - take the criminal out of society and hold him where he can't do harm (also serves a custodial function)

e. Institutional goal is control of inmates (drugs, behavior modification, rehabilitation, isolation, etc.)

2. Types of Sentences

a. Probation - non-custodial supervision subject to revocation (when and why granted?)

Note: Mention of Huber law privileges; allowing inmates to leave incarceration in order to work

b. Prison - custodial supervision

1) Historical background concerning prisons (see appendix)

2) Incarceration in prison results from felony conviction

3) Types of prisons (maximum/medium/minimum/half-way houses)

4) Present day problems and efforts at reform

c. Parole - non-custodial supervision

1) How granted - parole board

2) Movement to abolish parole, other problems

d) Capital punishment: the ultimate sentence

1) Historical background

2) Arguments pro/con

3) Present day issues and arguments (see Furman vs. Georgia, 408 U.S. 238 [1972]: arguments before U.S. Supreme Court)

4) Learning activity: Debate in class

Note: Interested students might prepare written position/research paper concerning this topic or any question raised in sentencing unit.

3. Learning Activity: The Sentencing Game (from "Bill of Rights Newsletter"[1], Spring 1975)

Note: See appendix 14 for Wisconsin penalties applicable to game situations.

VI. SUMMARY (1/2 week)

A. Course Evaluation - students and instructors spend one class critically analyzing the course for improvements in method and material.

B. Course Review - students and instructors spend one class reviewing students' questions in preparation for the final examination.

FOOTNOTES

(Sources)

1. "Bill of Rights in Action" (quarterly newsletter)
   Constitutional Rights Foundation
   6310 San Vicente Boulevard
   Los Angeles, CA 90048 --- $4.00 per year

*2. Police Patrol (game)
   Constitutional Rights Foundation
   6310 San Vicente Boulevard
   Los Angeles, CA 90048 --- $12.50

3. Remington, Frank, et al.
   Criminal Justice Administration,
   Bobbs, 1969. 1973 supplement

4. Inquiry Instructional Materials
   Wisconsin Bar Foundation
   402 West Wilson Street
   Madison, WI 53703
   Revised 1974 2 volumes --- $8.00

*5. Plea Bargaining (game)
   Simile II
   P. O. Box 910
   Del Mar, CA 92014 $25.00

6. "Trial: The City and County of Denver Versus Lauren R. Watson Series. (NET, 1970)
   Indiana University Audio-Visual Center
   Bloomington, IN 47401
   16 mm. black & white film (in 4 parts), 90 minutes
   Sale: $360.00 per part
   Rental: $18.00 per part

*Also available from:

Social Studies School Services
10,000 Culver Boulevard
Culver City, CA 90230

APPENDICES

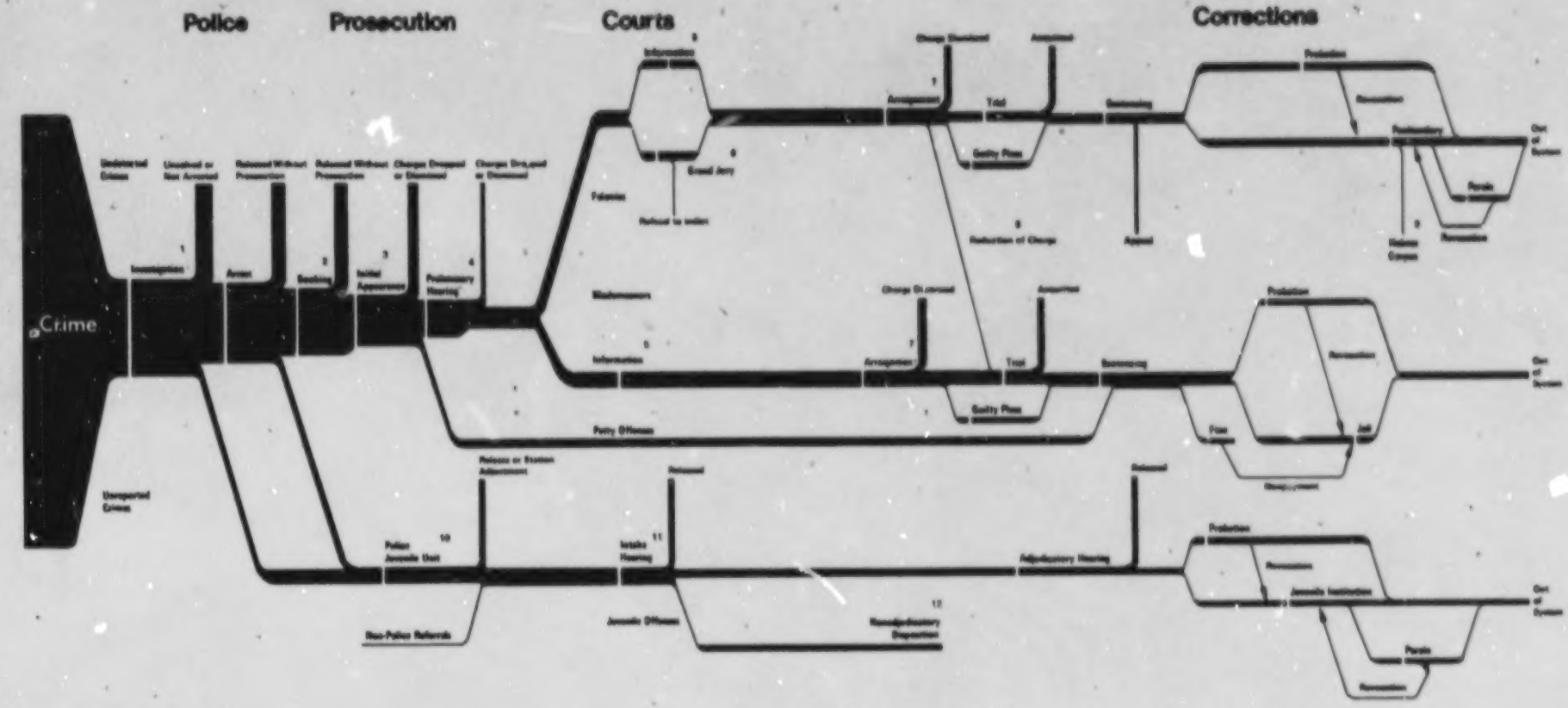
Crime and the Law

Waukesha High School - South Campus

A general view of The Criminal Justice System

This chart seeks to present a simple yet comprehensive view of the movement of cases through the criminal justice system. Procedures in individual jurisdictions may vary from the pattern shown here. The differing weights of line indicate the relative volumes of cases disposed of at various points in the system, but this is only suggestive since no nationwide data of this sort exists.

Source: The Challenge of Crime in a Free Society: A Report by the President's Commission on Law Enforcement and Administration of Justice (Washington, 1967)



1 May continue until trial.

2 Administrative record of arrest. First step at which temporary release on bail may be available.

3 Before magistrate, commissioner, or justice of peace. Formal notice of charge, advice of rights. Bail set. Summary trials for petty offenses usually conducted here without further processing.

4 Preliminary testing of evidence against defendant. Charge may be reduced. No separate preliminary hearing for misdemeanors in some systems.

5 Charge filed by prosecutor on basis of information submitted by police or citizens. Alternative to grand jury indictment, often used in felonies, almost always in misdemeanors.

6 Reviews whether Government evidence sufficient to justify trial. Some States have no grand jury system; others seldom use it.

7 Appearance for plea, defendant elects trial by judge or jury (if available), counsel for indigent usually appointed here in felonies. Often not at all in other cases.

8 Charge may be reduced at any time prior to trial in return for plea of guilty or for other reasons.

9 Challenge on constitutional grounds to legality of detention. May be sought at any point in process.

10 Police often hold informal hearings, dismiss or adjust many cases without further processing.

11 Probation officer decides desirability of further court action.

12 Welfare agency, social services, counseling, medical care, etc., for cases where adjudicatory handling not needed.

APPENDIX 2

PRE-TEST

Questions are to be answered as either true or false. Use a values voting method (raising hands, indicating thumbs up or down, arms folded, etc.) and a lively approach to encourage students to commit themselves. Correct answers are indicated in parentheses.

1. It is illegal to drive bare-footed in the state of Wisconsin. (False)
2. It is legal for two unmarried adults of the opposite sex to live together as long as they don't have sexual intercourse. (False)
3. All members of the state legislature are elected for 4 years. (False)
4. It is a felony (serious crime) to sell drugs, but it's not a felony if you give them away for free. (False)
5. It is legal to commit suicide. (True)
6. Fornication and sexual intercourse are the same thing in the eyes of the law. (False)
7. It is not a crime to smoke marijuana (i.e. "pot," "herb," "weed," "boo," etc). (True)
8. It is legal to assist another person's suicide. (False)
9. A 15-year-old may legally consent to sexual intercourse. (True)
10. The district attorney (D.A.) and prosecutor have the same role. (True)
11. To be convicted of a burglary, you must actually take something. (False)
12. Even though you are 18, you must first register before you are allowed to vote. (True)
13. If stopped on suspicion of drunken driving, you must give a sample of your blood, breath or urine. (False)
14. When stopped at night for speeding, the policeman finds a bag of pot by using his flashlight through the windows. You can be convicted for possession of marijuana. (True)
15. In Wisconsin, all burglars are sent to the same prison. (False)
16. As the defendant in a criminal case, you must testify if brought to the witness stand. (False)
17. A good defense attorney never defends anyone he knows to be guilty. (False)

APPENDIX 3

T.V. CRIME SHOWS - SUGGESTED ACTIVITIES

Source: "Bill of Rights in Action,"[1]
February 1977, p. 18

Divide the class into groups of five students.

Each group member should choose three crime dramas to watch on television. Be sure that within each group the five members choose different programs so that all 13 listed below are viewed by every group.

Reproduce the chart printed on page 23. The chart will help you "log" each T.V. show as you watch it. This means that you will make a mark on the chart in the proper column each time a leading character in the police or detective shows used one of the types of force listed while solving the crime.

During the week watch each of the three programs that you have selected. Log the crime-solving methods on the chart as you watch. Each time you mark that a particular type of force has been used, decide whether or not you think it was necessary. Use a check (✓) to mark the chart when the force was necessary; use an (x) when the force was unnecessary.

You might also want to make a note of other details which describe the incident in which a particular type of force was used. This will help you explain later why you thought it was necessary or unnecessary. There is room for extra notes and comments in every column.

After everyone has watched three programs, form into your groups of five. Now discuss the following questions.

1. Do you think the people on the show used too much violence to solve the crime? How could they have solved the crimes otherwise?

2. Do you think the use of violence made the shows more exciting?

3. Which show do you think was the most realistic? Why? Least realistic? Why? Compare your conclusions with those of the other students in your group. Then decide as a group which show from all the 13 watched seems to be the most realistic. Least realistic. Do the same for the most violent and least violent.

4. Do you think the amount of violence used might be dangerous for a child watching T.V.? Do you think that the crime dramas you watched should only be shown after 9:00 (after the family hour) when most children are in bed?

5. Do you think the government should have the power to reduce the level of violence used on these shows? Would such controls limit free speech? Would controls of violence lead to controls on information broadcast on evening news programs? To broadcast of other types of programs such as boxing matches or late-night movies?

After answering these questions in your individual groups, discuss the results of the group discussion with the whole classroom.

APPENDIX 3-2
T.V. Crime Shows

Invite a police officer to discuss T.V. police shows with your class.

LIST OF POLICE AND DETECTIVE PROGRAMS ("CRIME DRAMAS"):

MONDAY NIGHT

--none--

TUESDAY NIGHT

Police Woman (NBC)
Police Story (NBC)
Kojak (CBS)

WEDNESDAY NIGHT

Baretta (ABC)
Charlie's Angels (ABC)

THURSDAY NIGHT

Barnaby Jones (CBS)
Streets of San Francisco (ABC)
Hawaii Five-O (CBS)

FRIDAY NIGHT

Rockford Files (NBC)

SATURDAY NIGHT

Starsky and Hutch (ABC)
Most Wanted (ABC)

SUNDAY NIGHT

Switch (CBS)
McCloud (NBC)

TV Crime Shows - Activity Form

PROGRAM								
VERBAL THREAT		NOTES:		NOTES:		NOTES:		
FORCED ENTRY DOOR KICKED OPEN, ETC.								
PHYSICAL CONTACT WITHOUT WEAPON								
GUN AIMED								
GUN FIRED								
OTHER WEAPON								

APPENDIX 4

POLICE PATROL

(Developed by the Constitutional Rights Foundation)

Game Summary (partial)

Contents: Attitude survey, police work role-play situations, suggested field activities, discussion guide to follow up role plays, problem situations involving constitutional rights, police interrogation role-play, reference materials

1. Divide class into groups of at least 6. Two of these are police officers and are sent to the center of the room where all the "policemen" study the police manual. A third person is to be an observer.

2. Each group is given an incident and time to plan the role-play. (Observer should leave group during this period.)

3. Meanwhile, teacher briefs policemen on only the information which they would receive in the police call, and each 2-person police team decides how to handle the situation.

4. Role-play

5. Discussion based on the observer's evaluation in each group.

6. Police officers are called to the center of the room, each pair describing the incident and what happened, and how they felt at each stage of it. Discussion.

7. Police officers discuss with class how the situations would actually be handled. CAUTION: Police officers should not become involved until the end, or the goal of the role-play is defeated. Students must be allowed to experience to some degree what police officers feel and the questions which they must resolve for themselves.

APPENDIX 5

PROBLEMS OF ENFORCEMENT

The Policeman's Viewpoint

Discussion might begin by asking the class whether they feel police are necessary. A positive response could be met with the further position that, if necessary, police should be top quality; that top quality requires adequate salaries, and then ask why police are poorly paid.

1. Working Conditions. An officer may have to work a different shift each month and may be transferred to a new area before becoming adequately familiar with the old one. The class should easily identify personal danger as the worst aspect of police work, and perhaps next in line, nature of police work itself, i.e., constant contact with criminals, victims of crime, and the lower elements of society. Ask the class to comment on how a police officer's opinion of human nature might be affected by this.

2. Social Status. With low pay and poor working conditions established, ask the class why anyone would choose to be a police officer. Usually at least at first, it is for idealistic reasons such as helping others. Ask the class whether, theoretically at least, such a profession should not deserve respect and thanks from society.

--Quoted from Inquiry Instructional Materials,[4] vol. 2, p. 221.

APPENDIX 6

MISTAKEN DRUG RAIDS NOT ISOLATED CASES
By Andrew H. Malcolm
(c) New York Times Service

Washington, D. C. - Innocent Americans around the country have been subjected to dozens of mistaken, violent and often illegal police raids by local, state and federal narcotics agents in search of illicit drugs.

An eight week investigation by The New York Times has shown that, contrary to published reports and some government assertions, the recent illegal drug raids on two Collinsville (Ill.) families were hardly isolated incidents.

In fact, during the last three years, mistaken raids have been made by narcotics agents on all government levels, the raiders often acting on uncorroborated tips from informers.

Such incidents have resulted in at least four deaths, including one policeman slain when a terror stricken, innocent woman shot through her bedroom door as it was broken open. In California, an innocent father was shot through the head as he sat in a living room cradling his infant son.

Details of each raid vary, but generally they involve heavily armed policemen, arriving at night, often unshaven and in slovenly undercover attire, bashing down the doors to a private home or apartment and holding the innocent residents at gunpoint while they ransack the house.

--"THESE RAIDS ARE COMMON PRACTICE."--

Sometimes the agents have warrants and identify themselves. Sometimes they do not.

Frequently, the raiding party is rude, abusive and, as in Collinsville, shouts obscenities at its terrified victims.

In Los Angeles, a veteran police officer says mistaken raids occur once or twice a month. In Miami, complaints of police harassment on drug searches are so frequent that Legal Services of Greater Miami no longer can handle the caseload. "These raids are a common practice," said a civil liberties lawyer in Washington.

Taken individually, the raids have been little noticed nationally, apparently because they were believed to be isolated aberrations or unfortunate but understandable errors as hardpressed police forces sought to combat drug addiction, which President Nixon has called "Public Enemy No. 1."

Taken together, the mistaken raids paint a picture of strongarm police tactics, shoddy or nonexistent preraid police investigation and the pressures and brutalizing impact on the police of constant contact with what they call "society's scum," the drug pusher.

The incidents also underline what some view as an inherent danger in "no-knock" narcotics raids, which were authorized for federal agents by Congress in 1970. Some states have similar statutes.

APPENDIX 6-2
Mistaken Drug Raids
Not Isolated Cases

Under these laws, the police may obtain a special no-knock search warrant authorizing them to break into homes unannounced if there is probable cause to believe that the evidence sought could be quickly destroyed or disposed of, or if giving notice of police presence could endanger an officer of their person.

--"TRUSTED INFORMANT"--

In Washington on May 2, 1970, seven policemen, only one in uniform, broke into Miss Lauretta Whitney's home, knocked her down and ransacked the apartment in search of illegal narcotics. They found none.

The address on the warrant came from a "trusted informant," the city police said--but now that Miss Whitney is suing for $100,000 damages, officials say they have no idea where the informer is.

On January 24 in Philadelphia, three offduty patrolmen were drinking in a bar when, they say, a patron told them they could find narcotics in a nearby house.

According to a police investigation, the three men went to the house, ransacked it and beat three occupants. Not finding any drugs, they forced a passerby into the house and beat him, too.

--3 MORE ARE BEATEN--

Then the patron took the officers to another house, where they beat three other occupants. They found no drugs there, either.

The police were suspended and arrested.

On April 24, 1972, local policemen and agents of the Bureau of Narcotics and Dangerous Drugs moved on the mountain retreat of 24 year old Dirk Dickenson near Eureka, California, to seize a "giant lab" producing drugs.

Arriving on foot with dogs and in a borrowed helicopter, the agents, who were not in uniform and who did not identify themselves, assaulted the cabin with rifles and pistols. Dickenson, apparently frightened and baffled, ran toward the woods.

--"SOMETIMES THERE'S A THIN LINE BETWEEN THE HUNTED AND THE HUNTER."--

An agent shot him in the back. Dickenson died. It is a violation of bureau rules to shoot at fleeing suspects. No "giant lab" was found.

The US attorney in San Francisco said there had been no civil rights violations and the killing had been justifiable homicide.

--ENFORCEMENT EXPLOSION--

The reasons behind these mistaken raids are tied intimately to the explosion of government drug enforcement activities in recent years.

To some observers, such mistaken raids are just that--mistakes caused by an understandable mounting police frustration with the growing drug problem. They say that members of the more vocal middle class now are being subjected to rigorous police techniques that some critics say have long been used in black communities.

.APPENDIX 6-3
Mistaken Drug Raids
Not Isolated Cases

To others, however, the mistaken raids signal the emergence of a dangerous climate of repression, much like those experienced during previous campaigns against drug use.

At its formation in 1968, the Bureau of Narcotics and Dangerous Drugs, the main federal arm against drugs, had 615 agents and a $14 million budget. Now it has 1,586 domestic agents and a $74 million budget.

--FAST RECRUITING--

With its sudden growth, the bureau has had to do some fast recruiting. "A majority of our people come to us right out of college," said Richard Ulrich, administrative officer for the National Training Institute, the bureau's training arm.

The institute runs a 10 week school for new agents and hundreds of local policemen, with 600 hours of instruction, including 26 hours on due process and the Constitution's Fourth Amendment, which prohibits "unreasonable searches and seizures." But apparently attendance is not required; some agents involved in mistaken raids had not taken the course.

A raid can be planned on a moment's notice using agents who happen by, or it can be planned for a week. Wearing disguises, the agents surround the site and draw their weapons.

--THE SCARIEST RAID--

"You have to go in with the idea that this guy is going to fight," said one agent. "He's always being shaken down by other pushers. So you figure you'll be staring down a gun barrel."

"I've been on 200 or so raids," he continued, "and the no-knock is the scariest. You ask yourself what would you do if your door came crashing down at 3 a.m. and you had a gun. You'd let go, right? Personally, I think the danger might outweigh the value."

Another drug official added: "It's hard for outsiders to set a normal standard of behavior. You can't ask an agent to spend three months on a case and then expect him to announce himself politely and listen to every toilet on the floor flush away the evidence. You have to be a saint to do that."

Such daily work might even corrupt a saint. "If you spend weeks undercover, living in a hole and dealing with drug people," one agent said, "your whole lifestyle changes and perhaps your morals, too. Sometimes there's a thin line between the hunted and the hunter."

--From Project Inquiry Instructional Materials, 1974, Vol. 2, p. 226.

APPENDIX 7

SEARCH WARRANT

STATE OF WISCONSIN)
(ss
COUNTY OF DANE)

In the County Court of the County of Dane

THE STATE OF WISCONSIN, to the Sheriff, or any Constable or other peace officer for said County:

WHEREAS, _____ has this day complained in writing to the said Court of the County of Dane, upon oath that on the _____ day of _____, 19 __, in the County of Dane that there is now located and concealed in and upon certain premises, in the _____ of _____, in said county, occupied by _____ _____ and more particularly described as follows:

certain things, to wit:

possessed for the purpose of evading or violating the laws of the State of Wisconsin, and contrary to Section ____ of the Wisconsin Statutes; which things were used in the commission of and may constitute evidence of a crime, to wit:
committed in violation of Section ____ of the Wisconsin Statutes; and prayed that a Search Warrant be issued to search said premises for the property aforesaid.

NOW, THEREFORE, in the name of the State of Wisconsin, you are commanded forthwith to search the said premises for the property aforesaid and if the same or any portion thereof are found, to bring the same, and the person in whose possession the same are found, and return this warrant within forty-eight hours, before said Court, to be dealt with according to law.

WITNESS, the Honorable _____, Judge _____ Court, Branch ____, Dane County, Wisconsin, this _____ day of _____, 19 __.

_____
Judge

ENDORSEMENT

Received by me this ____ day of _____, 19 __, _____

_____
(Sheriff) (Peace Officer)

COUNTY COURT)
(ss
COUNTY OF DANE)

RETURN OF OFFICER

Dated this ____ day of _____, 19 __
at _____, Wisconsin

I hereby certify that by virtue of the within warrant I searched the within named premises and found the following:

and have the same now in my possession subject to the disposition of the Court

_____
(Sheriff) (Peace Officer)

APPENDIX 8

State v. McDougal
68 Wis. 2d 399 (1974)
(full text)

where he had pled guilty in part to avoid implicating his jailbreak confederates; and in *State v. McKnight,*[14] that the defendant could not withdraw his plea where the plea was allegedly entered based upon the mistaken belief that there was no other way to secure a bail review.

Additionally, there are compelling practical reasons for not imposing upon the trial court the duty of informing defendants of their parole rights. Such information, if it is to be supplied, should come from the defendant's counsel. The trial court is solely responsible for the sentencing decision, but decisions concerning parole are made by the department of health and social services. It is impossible for the court, or anyone, to state in advance how long a particular defendant will spend in prison. He may be paroled under sec. 57.06, Stats., after a certain period, at the department's discretion. He is entitled to parole as a matter of right under sec. 53.11 (7) (a) but he must first accumulate sufficient "good time" credits under sec. 53.11 (1) and "diligence" credits under sec. 53.12 (1), which, as the names imply, depend upon the inmate's prison behavior, another factor not known in advance. The situation is further complicated where, as here, a defendant commits a crime while on parole and is returned to prison. Under sec. 53.11 (7) (b) the inmate may again be released when sufficient good-time credits are accumulated, but the release is no longer mandatory; the subsection provides "Subject to the approval of the department, he *may* again be released."[15] (Emphasis supplied.) Thus, since the time when a defendant may actually be released

[14] (1974), 65 Wis. 2d 582, 223 N. W. 2d 550.

[15] In contrast, sec. 53.11 (7) (a), Stats., provides that the inmate "*shall* be released." This subsection applies where the inmate initially accumulates sufficient good-time credits. If he violates parole and is returned to prison, sec. 53.11 (7) (b) controls. The distinction between the subsections was discussed in *State ex rel. Stenson v. Schmidt* (1964), 22 Wis. 2d 314, 125 N. W. 2d 634.

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from jail cannot be determined in advance and may be dependent upon factors outside the trial court's knowledge and its control, we conclude it would be unreasonable to require the court to inform every defendant pleading guilty of his parole rights.

By the Court.—Judgment and order affirmed.

STATE, Plaintiff in error, v. McDOUGAL, Defendant in error.

No. State 85. Argued April 9, 1975.—Decided May 6, 1975.
(Also reported in 228 N. W. 2d 671.)

1. **Constitutional law—Searches and seizures—Police automobile inventory—Applicability of fourth amendment guarantees.** In this state's appeal from an order suppressing marijuana found in locked suitcases in the trunk of an automobile driven by defendant when he was arrested for not having a driver's license in his possession, the supreme court reviews prior federal and state cases dealing with police inventories and determines that such inventories are searches to which the fourth amendment standard of reasonableness is applicable in two respects: (1) Whether the intrusion was reasonable in the first instance, and (2) whether the scope of the intrusion was reasonable. pp. 404–410.

2. **Constitutional law—Searches and seizures—Police automobile inventory—Reasonableness test—Determination on case-by-case basis.**
The determination of what constitutes an unreasonable search during a police inventory depends upon the particular facts of each case and involves a balancing of the state's need to search with the individual's right to be free from severe intrusions of privacy and the possibility of abuse. p. 410.

3. **Constitutional law—Searches and seizures—Police automobile inventory—Search of closed suitcase or containers—Unreasonableness.**
As a general rule, examination of the contents of a closed suitcase or other container during a police inventory search is unreasonable, since the purposes of such a search—protection

of the police from claims of theft and protection of the defendant's property—do not usually require an inspection of closed suitcases or containers. pp. 412, 413.

4. Constitutional law—Searches and seizures—Police automobile inventory—Search of suitcase contents—Unreasonableness. Although search of the vehicle driven by defendant was proper as to all items in plain view, the inventory search of two locked suitcases in the trunk, after the keys were found in the glove compartment, was unreasonable because: (1) The suitcase and keys could have been inventoried with other items; (2) defendant was never asked whether he wished the suitcase contents inventoried; (3) the leaving of possessions other than the suitcases in the automobile and its storage in the open in a junkyard, resulting in a cracked engine block, were hardly consistent with either protection of the police or possessions; and (4) the contents of locked suitcases or travel bags may be extremely personal, and a search thereof is the type of invasion of privacy the constitutions sought to prohibit. pp. 412–414.

ROBERT W. HANSEN, J., dissents.

ERROR to review an order of the circuit court for La Crosse county: PETER G. PAPPAS, Circuit Judge. *Affirmed.*

The state has appealed from an order suppressing evidence seized during an inventory search of an automobile driven by the defendant.

At about 3:40 a.m., on November 3, 1973, the defendant, Bruce David McDougal, was driving an automobile west on Highway I–90 toward La Crosse. He was traveling 65 miles per hour in a 60-mile-per-hour zone and was stopped for speeding by State Trooper Terry Knutson. Knutson also discovered an equipment violation, *i.e.*, a faulty muffler. McDougal did not have his driver's license or any other identification with him.

Upon inquiry, McDougal told the officer he was on his way to La Crosse to get bail money for a friend, Peter Byrne, the owner of the vehicle, who had been ar-

rested earlier in the evening and was in the Eau Claire county jail.

Knutson radioed to his headquarters to have the defendant's story verified. He was informed that Peter Byrne was in jail on charges of disorderly conduct and "possession," which Knutson took to mean possession of drugs, that he was intoxicated, that he did in fact own the car, but that he had no need for bail money since he had $750 on his person when arrested.

After receiving this information, Knutson asked the defendant how he came to be in possession of the Byrne car. McDougal replied that after Byrne's arrest the Eau Claire police had told him to take charge of the car.

Knutson shined his flashlight into the back seat of the car and observed a considerable quantity of loose clothing and some canned food. He asked the defendant to open the trunk of the car. The defendant construed that to be an order and did so, unlocking it with a key. Inside were several items, including two firearms, a substantial amount of ammunition, duck decoys, clothing and two green suitcases. The defendant stated the suitcases were not his. When Knutson asked the defendant to open the suitcases, he tried but informed Knutson that they were locked. Knutson later testified he was curious as to what was in the suitcases.

Knutson gave the defendant a warning as to his speeding, a correction notice as to the faulty muffler, but arrested him for failure to carry a driver's license and ordered him to follow Knutson's patrol car to the La Crosse county sheriff's office, where they arrived at about 4:15 a.m. The car was parked on the street adjacent to the county jail. The defendant was charged with failure to carry a driver's license and operating a motor vehicle without the owner's consent because it allegedly could not be established at that time whether Byrne had

consented to the defendant's use of his car.[1] McDougal could not post bond and was placed in a jail cell.

At about that time the La Crosse authorities called the Eau Claire police to determine whether Byrne would consent to a search of his car by the La Crosse sheriff's department. Eau Claire Police Officer James T. O'Dell inquired of Byrne but failed to get his consent and so informed the La Crosse officials. The defendant was never asked whether the car could be searched.

At about 6:45 a.m., the car was moved into the La Crosse courthouse garage and searched, with a detailed inventory made of all its contents. The two suitcases in the trunk, which were unlocked with keys found in the glove compartment, were found to contain a substantial quantity of marijuana. The suitcases were seized. No attempt was ever made to obtain a search warrant.

The defendant was charged with possession of marijuana with intent to sell, contrary to sec. 161.41 (1m) (b), Stats.

At the hearing to suppress the evidence, La Crosse County Deputy Sheriff Gerald T. Clark, who conducted the search, testified with respect to the policy of the sheriff's department concerning vehicles when the owner has been arrested:

"We have to naturally secure it in some way so that it can't be stolen or anything by the general public, and we do this to protect it. In this particular case, this car couldn't have been locked or secured so it was moved into the garage area which is somewhat more secure and it was then inventoried, so we knew what the person had with him when he got there."

He further testified that the vehicle could not be left in the courthouse garage for an extended period of time.

[1] Eau Claire Police Officer James T. O'Dell testified, however, that he had informed the highway patrol dispatcher conveying Trooper Knutson's inquiry, that Byrne had in fact stated that the defendant did have his permission to operate the car.

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There was a conflict in the testimony as to what extent the car could be locked.

As to the trunk, Trooper Knutson testified that the defendant used a key to open it on the highway. Deputy Clark testified that the trunk, which was damaged, could be opened in two ways, either with a key or by pulling a small wire protruding from a hole in the trunk. Byrne, the owner of the car, testified that the trunk would open only with a key. When he went to retrieve his car in the area where it was stored, however, he testified that the trunk was damaged more than it had been previously and that it was possible to open it without a key, "after a little bending." An investigator testified that when he observed the car in storage the trunk was damaged and wired down and "probably" could not be locked.

With regard to the car itself, Deputy Clark testified that it could not be locked. Trooper Knutson testified that when they arrived in La Crosse he was informed by the defendant that he could not lock the right front door. Byrne testified that all the doors on the car locked. The defendant testified that when he arrived in La Crosse he locked all the doors on the car. The investigator testified that he determined by examining the car, a two-door, that it could be locked, but only by locking the driver's side from the inside, and then exiting through the passenger's door and locking it with a key.

The car was taken to a junkyard in the nearby city of Onalaska and allegedly stored in a pole building.

Several days later, when Byrne tried to get his car, he found it outside at the junkyard. It contained his clothing, canned food and several other items. The two guns, a pistol and a shotgun, together with the ammunition, were in the trunk of the car. Because of the inclement weather the water in the engine block had frozen and cracked the block making the car inoperable.

In its memorandum decision the trial court held that the search of the locked suitcases without a warrant, in

the course of an inventory search conducted so that no claims of theft or loss could be made against the sheriff's department, was an unreasonable search and that the evidence so obtained should be suppressed.

For the plaintiff in error the cause was argued by *Thomas J. Balistreri*, assistant attorney general, with whom on the briefs was *Robert W. Warren*, attorney general.

For the defendant in error there was a brief by *Patrick R. Doyle* of La Crosse, and oral argument by *Daniel B. Watson* of Gays Mills.

BEILFUSS, J. The issues raised on this appeal deal only with the existence and validity of an "inventory search." There is no attempt by the state to justify the intrusion into the automobile as a consent search, a search incident to arrest, a probable cause search, an exigent circumstances search, or anything other than an inventory search. The record clearly indicates that due to the lack of consent, the time and place of the intrusion, and the general lack of any other mitigating circumstances, no other justification can arguably be found.

The state contends that an inventory of a motor vehicle is not a "search" in the constitutional sense, and that therefore state and federal restrictions and safeguards regarding searches and seizures are inapplicable. The defendant takes the opposite view, contending that the intrusion is a "search," and hence is subject to constitutional restraints, especially the requirement of reasonableness.[2]

[2] United States Constitution, Amendment, art. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

In *State v. Dombrowski* (1969), 44 Wis. 2d 486, 171 N. W. 2d 349, the defendant, an out-of-state police officer, had been taken into custody after he became intoxicated and ran his car into a ditch. The car was disabled and immovable. The local authorities were of the impression the out-of-state officer had his service revolver with him at all times and searched the car primarily to find the revolver so that it would not fall into unauthorized hands. During the search for the revolver in the trunk of the car the police found evidence that eventually tended to implicate the defendant in a murder charge.

The majority of this court concluded that such conduct did not constitute a "search," relying on *Edwards v. State* (1968), 38 Wis. 2d 332, 338, 156 N. W. 2d 397, for the proposition that, " 'A search implies a prying into hidden places for that which is concealed,' " and on *Haerr v. United States* (5th Cir. 1957), 240 Fed. 2d 533, 535, for the statement:

"A search implies an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action. The term [search] implies exploratory investigation or quest. . . ."

The majority's conclusion was upheld in habeas corpus proceedings before the Federal District Court for the Eastern District of Wisconsin.[3] However, both the Seventh Circuit Court of Appeals and the United States Supreme Court, in later proceedings in the same case,

Wisconsin Constitution, art. I, sec. 11: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

[3] *Dombrowski v. Cady* (1970), 319 Fed. Supp. 530, 532.

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specifically refused to reach the issue because the state had conceded that a "search" was involved.[4]

In *State v. McCarty* (1970), 47 Wis. 2d 781, 786, 177 N. W. 2d 819, and *Warrix v. State* (1971), 50 Wis. 2d 368, 376, 184 N. W. 2d 189, this court expressly reaffirmed its holding in *Dombrowski*. In *Warrix*, at pages 376 and 377, however, the court stated with respect to searches of vehicles being kept for safekeeping by police while the owner or operator is in jail:

". . . Many times claims against the police have been made by the accused that personal property has disappeared from his car while he and the car were in police custody. To protect the police from such claims, a custodial search and inventory may be made of the personal property in a car which can be easily removed. . . . As in any other search, the reasonableness depends upon the circumstances in each case. Here, we hold the searches were reasonable."

The last two quoted sentences clearly indicate the inventory search is considered a search, albeit an exception to the warrant requirement. Because of this apparent conflict in the decisions, and because of the significance of the question involved, it is desirable that the court should undertake a re-examination of the problem.

Generally speaking, the state and federal cases from other jurisdictions split on this question. One group holds, quite simply, that a proper police inventory (*i.e.*, one not a mere subterfuge for an exploratory, evidence-seeking intrusion) is not a "search," but merely a procedure for the protection of the police and the owner.[5]

[4] *Dombrowski v. Cady* (1972), 471 Fed. 2d 280, 283, certiorari granted; *Cady v. Dombrowski* (1973), 413 U. S. 433, 442, 93 Sup. Ct. 2523, 37 L. Ed. 2d 706.

[5] *See: Lowe v. Caldwell* (D. C. Ga. 1973), 367 Fed. Supp. 46; *People v. Sullivan* (1971), 29 N. Y. 2d 69, 272 N. E. 2d 564; *State v. Wallen* (1970), 185 Neb. 44, 173 N. W. 2d 372; *Mackall v. State* (1969), 7 Md. App. 246, 255 Atl. 2d 98.

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These cases generally draw their support from *Harris v. United States* (1968), 390 U. S. 234, 88 Sup. Ct. 992, 19 L. Ed. 2d 1067, a per curiam decision wherein the United States Supreme Court held that where a piece of evidence was discovered by a police officer who, after searching an impounded vehicle pursuant to a police regulation, while opening a door to roll up the window and lock such door, noticed the evidence, a registration card, lying face up on the metal stripping over which the door closed, such evidence was admissible and was not the result of a search. The court emphasized, however, that the basis of its decision was not the fact that the search was pursuant to a police regulation on impounded cars, but rather was that, while attempting to lock the car to protect it, the card came within the "plain view" of the officer while he had a right to be in the position to have such view. We do not believe *Harris* is absolute authority for the proposition that inventory searches are not subject to fourth amendment strictures.

Courts subscribing to the opposite view generally hold that the intrusion is a "search," and then proceed to determine whether it was reasonable under the circumstances and hence not violative of constitutional limitations. A leading case is *Mozzetti v. Superior Court* (1971), 4 Cal. 3d 699, 704–706, 94 Cal. Rptr. 412, 484 Pac. 2d 84, where the Supreme Court of California stated:

". . . several Courts of Appeal have adhered to a circumscribed semantic approach in defining the scope of the Fourth Amendment's prohibition against unreasonable searches and seizures. Such a concept was expressly rejected by the United States Supreme Court in *Terry v. Ohio* (1968), 392 U. S. 1 [20 L. Ed. 2d 889, 88 S. Ct. 1868]. Responding to the government's view that police stop-and-frisk activity was not within the scope of the Fourth Amendment, the court stated: 'In our view the sounder course is to recognize that the

Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness. [Citations.] This seems preferable to an approach which attributes too much significance to an overly technical definition of "search". . . .'

"It seems undeniable that a routine police inventory of the contents of an automobile involves a substantial invasion into the privacy of the vehicle owner. Regardless of professed benevolent purposes and euphemistic explication, an inventory search involves a thorough exploration by the police into the private property of an individual. In that process suitcases, briefcases, sealed packages, purses—anything left open or closed within the vehicle—is subjected without limitation to the prying eyes of authorities. Merely because the police are not searching with the express purpose of finding evidence of crime, they are not exempt from the requirements of reasonableness set down in the Fourth Amendment. Constitutional rights may not be evaded through the route of finely honed but nonsubstantive distinctions.

"Purely and simply the police inventory conducted here was a police search. Therefore, we disapprove those cases which have suggested that a police inventory may be validated without reference to the requirements of the Fourth Amendment." [6]

Two United States Supreme Court decisions lend credence to the proposition that an auto inventory by police is a search. In *Preston v. United States* (1964), 376 U. S. 364, 84 Sup. Ct. 881, 11 L. Ed. 2d 777, the defendants were arrested for vagrancy and their auto was im-

[6] *See also: United States v. Lawson* (8th Cir. 1973), 487 Fed. 2d 468; *People v. Willis* (1973), 46 Mich. App. 436, 208 N. W. 2d 204; *State v. Nemrod* (1973), 85 N. M. 118, 509 Pac. 2d 885; *Fruit v. State* (Okla. Crim. App. 1974), 528 Pac. 2d 331.

Some cases dealing with inventory searches apply constitutional standards without ever expressly deciding whether the intrusion is in fact a "search." *See: State v. Keller* (1973), 265 Or. 622, 510 Pac. 2d 568; *State v. Gwinn* (Del. Supr. 1972), 301 Atl. 2d 291.

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pounded and searched. In analyzing the case, the court stated that "searches of motorcars must meet the test of reasonableness under the Fourth Amendment before evidence obtained as a result of such searches is admissible." *Id.* at page 366.

In *Cooper v. California* (1967), 386 U. S. 58, 87 Sup. Ct. 788, 17 L. Ed. 2d 730, the defendant was arrested on a charge of selling narcotics and his vehicle was impounded pursuant to a state law requiring any officer making a narcotics arrest to impound any vehicle used to store, conceal, transport, sell or facilitate the possession of narcotics "to be held as evidence until a forfeiture has been declared or a release ordered." California Health & Safety Code, sec. 11611. The court clearly seems to have treated the intrusion as a "search," thereby applying the fourth amendment standard of reasonableness:

". . . It is no answer to say that the police could have obtained a search warrant, for '[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.' *United States v. Rabinowitz*, 339 U. S. 56, 66. Under the circumstances of this case, we cannot hold unreasonable under the Fourth Amendment the examination or search of a car validly held by officers for use as evidence in a forfeiture proceeding." *Cooper, supra*, page 62.

We conclude that the latter line of cases not only compels the conclusion that an inventory search is a "search," but also represents the better reasoned approach. An inventory search can be a serious intrusion into the private affairs of the individual. Cases holding that such conduct is not a search limit their inquiry to the question of whether the search is a bona fide inventory. Cases taking the opposite view consider that question, but also concern themselves with the "reasonableness" of the intrusion, *i.e.*, once it is established that it is not improper to

conduct an inventory, the question becomes whether the manner in which the inventory is conducted, its scope, is reasonable. We believe the severity of the intrusion and its possibility for abuse requires this double-barreled protection.

As we view the problem, there are essentially two aspects to the question of reasonableness. First, whether the intrusion was reasonable in the first instance, and second, whether the scope of the intrusion is reasonable. We consider here whether the scope of the search was reasonable, assuming the inventory search itself was justified.

The determination of what conduct amounts to an unreasonable search and seizure depends upon the particular facts of each case.[7] The very fact that an automobile rather than a home is involved is a significant factor.[8] However, "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." [9] What is required is a balancing of the state's need to search and the individual's right to be free from intrusion.

The cases that discuss the permissible scope of inventory searches generally conclude that examinations of the contents of closed suitcases and other containers is unreasonable. In *Mozzetti v. Superior Court, supra,* pages 707, 708, the court stated:

"We have no doubt that the police, in the course of such valid protective measures, may take note of any personal property in plain sight within the automobile being taken into custody. Any objects clearly visible

[7] *Ker v. California* (1963), 374 U. S. 23, 33, 83 Sup. Ct. 1623, 10 L. Ed. 2d 726; *Warrix v. State* (1971), 50 Wis. 2d 368, 376, 377, 184 N. W. 2d 189; *Alston v. State* (1966), 30 Wis. 2d 88, 95, 140 N. W. 2d 286.

[8] *Preston v. United States, supra,* pages 366, 367.

[9] *Coolidge v. New Hampshire* (1971), 403 U. S. 443, 461, 462, 91 Sup. Ct. 2022, 29 L. Ed. 2d 564.

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without probing—including the suitcase in this instance—may be listed in an inventory or other police report. (See *Harris v. United States* (1968), *supra*, 390 U. S. 234, 236 [19 L. Ed. 2d 1067, 1069].) What concerns us here is the reasonableness of the search *into* the closed suitcase.

"It is significant that all but two of the Court of Appeal opinions relied upon by the People as authority for the inventory search of vehicles in lawful police custody involved inventories made after the driver of the vehicle was arrested. . . . Thus, in those circumstances, . . . the drivers of the vehicles were on the scene and the police could have readily ascertained their preference for the care of their personal property. There is little doubt that all of them would have preferred, for protection of their property, that the police simply close the windows and lock the doors, rather than search the contents of their cars. Nevertheless, in not one of those cases did the Court of Appeal suggest that the police might have inquired of the owner what he wanted done to safeguard his property. Thus we find unpersuasive the contention made by the People that the inventory of contents not within plain sight is reasonable because it is necessary to protect the property for the benefit of the vehicle owner."

In *State v. Keller*, *supra*, page 626, the Supreme Court of Oregon held, in a case where an officer, conducting the inventory of an auto, opened a tackle box which was bound shut with wire:

". . . The officers testified they were not searching for evidence, but were only inventorying the automobile's contents. With no exigent circumstances present they could have easily inventoried 'one fishing tackle box,' along with other items in plain view. . . ."

In *State v. Gwinn*, *supra*, pages 293, 294, the Delaware Supreme Court stated:

". . . it is clear that the police inventory search of the contents of the defendants' automobile was reasonable under the circumstances, there having been a lawful arrest and impoundment, and there having been no in-

dication that the inspection was a search for evidence and not a bona fide inventory for the stated protective purposes. Thus, any contraband coming into the 'plain view' of the officer during the inventory was subject to seizure and use in a criminal prosecution under the rules here approved.

"This brings us to the question of whether the contents of the closed satchel found in the trunk of the automobile came within the 'plain view' doctrine. We think not. The record indicates nothing unusual or suspicious about the satchel. While the satchel itself was in 'plain view' of the officer as he inventoried the contents of the auto trunk, the contents of the satchel were not in his 'plain view' and do not fall within that doctrine.

"The opening of the satchel and an inventory of its contents were not necessary for the stated protective purpose. An effective sealing device or chain-lock device suitable for suitcases and other baggage found in a motor vehicle during an inventory would have sufficed for the security purposes sought. A detailed inventory of the contents of baggage appear to be an impractical and unnecessary, and therefore unreasonable, intrusion under the circumstances. Baggage usually contains innumerable personal items. The police should be relieved of the too-burdensome obligation of such inventory; and the citizen should be relieved of such impractical and unnecessary intrusion of his privacy. In this connection, it is noteworthy that towaway and impoundment are daily consequences of certain parking violations."

The essence of these and other cases [10] so holding is that the objects sought to be achieved by the inventory search—protection of the police from claims of theft and protection of the defendant's property—do not usually require an inspection of closed suitcases and containers. We conclude this principle holds true in this

[10] *People v. Grana* (Colo. Sup. Ct. 1974), 527 Pac. 2d 543; *Mestas v. Superior Court* (1972), 7 Cal. 3d 537, 102 Cal. Rptr. 729, 498 Pac. 2d 977; *State v. Bradshaw* (1974), 41 Ohio App. 2d 48, 322 N. E. 2d 311. *Contra, State v. Vigil* (1974), 86 N. M. 388, 524 Pac. 2d 1004.

case. The sheriff's department could have simply inventoried "two green suitcases." As far as the protection of the defendant's property is concerned, the fact that all of the contents of the car, including firearms and ammunition, were left in the car after the inventory indicates that there was no need to examine the contents of the suitcases. As far as possible claims against the officers are concerned, the sheriff could easily have inquired of the defendant whether he desired an inventory of the suitcases' contents. Furthermore, the officers would be just as well protected against claims of theft by inventorying and sealing the closed suitcases as by inventorying their contents.

We recognize the right of the police to conduct an inventory search of an impounded vehicle to protect themselves against false claims of loss of property while the vehicle is in police custody, and conclude the inventory search of the vehicle in question as to all items in plain view was proper. However, in view of the federal and state prohibitions against unreasonable intrusions into the privacy of individuals, the police cannot engage in an unlimited search under the guise of a police inventory search. We have no doubt that false claims of loss of property have been made against police officers; however the incidence of such claims (none have reached this court) is not such that we should countenance unreasonable invasions of the privacy of others. The police can take reasonable steps to conduct a police inventory to protect themselves against false claims but not unreasonable ones. Here, we think, the examination of locked suitcases was unreasonable. The fact that keys to the suitcases were found in the glove compartment does not make the intrusion any more reasonable. The keys could easily have been inventoried and kept with the defendant's wallet, his pocket comb and fountain pen. To most people the contents of their

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locked suitcases or traveling bags are or can be extremely personal. To have these items examined and handled by strangers can cause embarrassment and humiliation. It is this type of invasion into one's privacy that our constitutions sought to prohibit.

Nor are we convinced that the police were benevolently trying to protect the contents of the car for the benefit of the owner. All of the items in the car except those that might be evidence of the possession of marijuana were not seized or otherwise protected. They were all left in the car which the police claim could not be locked. These items included two firearms and a substantial quantity of ammunition. The car was taken to a junkyard and for at least a part of the time left out in the open and exposed to the elements to the extent the engine block cracked and broke. This is hardly consistent with protection for the owner.

By the Court.—Order affirmed.

ROBERT W. HANSEN, J. *(dissenting).* The examination by the police of the contents of the two suitcases that were in police custody was entirely proper for two reasons:

1. *This was a valid custodial search and inventory of personal property in police custody.*

The automobile driven by defendant, plus the two locked suitcases and the keys to open the suitcases, came into police custody for safekeeping purposes when the defendant was placed in jail custody. Under these circumstances, our court has held that ". . . one of the custodial requirements is the inventorying of possessions belonging to the accused and placing them in safekeeping during his [the defendant's] custody in jail." [1]

So the police were here required to inventory and subsequently account for articles of personal property

[1] *Warrix v. State* (1971), 50 Wis. 2d 368, 376, 184 N. W. 2d 189.

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that came into their custody when the defendant was placed in jail. Ordinarily, this duty to inventory and account involves items of personal property carried on the person of the jailed defendant.[2] However, as our court has held: "The purpose and justification of a custodial search of a jailed person also applies to the accused's automobile which is taken into custody by the police for safekeeping while the accused is in jail custody." [3] The reason for placing this duty upon the police, our court has held, is that "Many times claims against the police have been made by the accused that personal property has disappeared from his car while he and the car were in police custody." [4] Thus, our court has held: "To protect the police from such claims, a custodial search and inventory may be made of the personal property in a car which can be easily removed." [5] With the obligation to subsequently account for items placed in police custody, such authority becomes an obligation, required by prudent police and custodial procedures.

For the court-specified purpose of protecting against future claims of impounded property being missing, such inventorying goes to contents, as well as container. To list "1 purse" or "1 pocketbook" would provide no protection at all to the police against a claim that $100 or $1,000 was later missing from purse or pocketbook. Similarly, as to the contents of an automobile, to list

[2] *Id.* at page 376, this court holding: "At the police station the defendants were required to empty their pockets as a part of the booking process. . . . It is argued this search is not incidental to their arrest and therefore in violation of their fourth amendment rights. . . . But, this court in *State v. Stevens* (1965), 26 Wis. 2d 451, 460, 132 N. W. 2d 502, has upheld a custodial search of the person . . . ."

[3] *Id.* at page 376.

[4] *Id.* at page 376.

[5] *Id.* at page 376.

"2 unlocked suitcases" would be scant protection against a subsequent claim that currency or valuable jewelry no longer was in the suitcases when they were returned to the defendant owner. Here the two suitcases were locked, but the keys to open them were also in the automobile and also came into police custody. There is no realistic difference between the police possessing a suitcase that is unlocked, and possessing both a locked suitcase and the key with which to open it. Inventorying of contents is required in both situations to protect against future claims of pilferage of contents while the suitcase is in police custody. Exactly so this court held where an attaché case, tobacco can and locked container came into postarrest police custody along with the key to open the container.[6] As in the case before us, the containers, there three and here two, were in the automobile defendant was arrested for driving without a driver's license. In *Sochle*, our court held that there was consent to the search. As to the state's contention that also involved was a custodial inventory search that included the right to open the locked container (the key fitting the lock was found on the person of the defendant), our court held:

"It is true that this court has approved such custodial search of the person or automobile of a jailed person, and stated the reason to be to protect the police as custodians from claims that 'personal property has disappeared from his car while he and the car were in police custody.' That is the law in this state and would be followed if it were applicable. However . . . consent to search was secured . . . ."[7]

In the case before us, with both the locked suitcases and the keys fitting the locks coming into police custody for safekeeping when the defendant was placed in jail

[6] *Sochle v. State* (1973), 60 Wis. 2d 72, 208 N. W. 2d 341.

[7] *Id.* at page 82.

custody, the police here had the duty, as well as the right, to inventory all items of personal property, including the contents of the suitcases. It follows, as this court has held, that: "If contraband or evidence or fruits of a crime are found in this process, the discovery does not make the search unreasonable." [8]

2. *The defendant voluntarily consented to the custodial search and inventory of the contents of the suitcases.*

At the time of his arrest, the defendant opened the trunk of the car with his key when the officer indicated his curiosity as to what was in the trunk. There were revealed two green suitcases. The defendant promptly volunteered that they did not belong to him. When the police officer also indicated that he was curious as to the contents of the two suitcases, the defendant not only did not object in any way to a police examination of the contents, but, repeating that they were not his suitcases, volunteered to open them and did, in fact, attempt to open them for inspection by the officer. This voluntary effort to open the suitcases for the officer was abandoned by the defendant only when it became apparent that they were locked. Actions speak louder than words, and here the volunteered assistance in seeking to open the suitcases bespeaks full consent as eloquently as the verbal consent of the defendant.

This is almost the exact fact situation that was before this court in the recent *Soehle Case*, where voluntary consent was held to validate the search by the police of the contents of a locked container.[9] In both cases, there as here, the drivers were placed under arrest for driving without a driver's license. Both defendants were driving automobiles belonging to someone else. Both consented to police inspection of the contents of the automobile. Dur-

[8] *Warrix v. State, supra*, footnote 1, at page 376.

[9] *Soehle v. State, supra*, footnote 6.

ing such search, both defendants pointed out items they claimed did not belong to them (in *Soehle*, a locked container; in the case before us, the two locked suitcases).[10] In both cases, the automobiles and their contents came into police custody for safekeeping when the defendants were placed in jail. In *Soehle*, such contents included the locked container; in the case here, such contents included the two locked suitcases. In the *Soehle Case*, the key that fit the lock of the container was found on the person of the defendant. In the case before us, the keys that fit the locks of the suitcases were found in the glove compartment of the automobile. In both cases, the police opened the locked container or cases and examined the contents, finding contraband, which, in both cases, the defendants later sought to suppress as products of constitutionally inadmissible searches. In *Soehle*, this court held:

"Given a completely voluntary and entirely proper consent to a search of the car for such purpose, the police secured the right not only to seize the three containers, but also to examine their contents. Given valid consent or proper search warrant, the resultant right to seek and find included the right to examine the contents, as well as to seize the attaché case, the tobacco can and the locked container." [11]

What was concluded as to consent given in *Soehle* to a search for incriminating evidence, applies here to the custodial search when the automobile and contents came into police custody for safekeeping purposes. The principle determining both situations has been stated by this court to be: "A search and seizure are not in violation of constitutional rights if the person freely and intelligently

[10] Such disclaimer of ownership—in both these cases—constitutes an obvious intentional relinquishment of a known right. *See:* 31 C. J. S., *Estoppel*, p. 482, sec. 86.

[11] *Soehle v. State, supra*, footnote 6, at page 83.

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gives his unequivocal and specific consent to the search, uncontaminated by any duress or coercion, actual or implied . . . ." [12] In both the *Soehle Case* and the case before us, such free and intelligent consent was given and for the same reason—defendants' electing to rely upon the claim that locked containers and their contents belonged to someone else. In the case before us, the defendant went beyond consent to affirmatively seek to open the locked suitcases so that the officer could inspect the contents defendant claimed belonged to someone else. That full and free consent, evidenced by word and volunteered actions, was never withdrawn, modified or limited, and it requires holding here that the evidence secured by such valid consent search was properly in the possession of the police.

The writer would hold the search here to be constitutionally valid both as a consent search and as a custodial search. So holding, the writer would reverse, setting aside the order of the circuit court granting defendant's motion to suppress evidence secured as a result of the search, and would remand the case for trial.

[12] *Barnes v. State* (1964), 25 Wis. 2d 116, 121, 130 N. W. 2d 264, in a search-of-the-person situation where the majority opinion held consent not to have been voluntarily given.

APPENDIX 9

Conrad v. State
63 Wis. 2d 616 (1973)
(full text)

CONRAD, Plaintiff in error, v. STATE, Defendant in error.

No. State 50. Argued February 6, 1974.—Decided June 4, 1974.
(Also reported in 218 N. W. 2d 252.)

1. **Searches and seizures—"Open fields" doctrine—Hester rule (265 U. S. 57).**
The "open fields" doctrine, first stated by the United States Supreme Court in *Hester*, which is predicated on the theory that the protection of the fourth amendment is to "persons, offices, papers, and effects," affords no protection to evidence either on or in the ground, whether concealed or hidden, unless the particular area in question is so intimately related to a protected area that it can come within the concept of curtilage. pp. 623–625.

2. **Searches and seizures—"Open fields" doctrine—Hester rule still viable.**
Although the *Hester* "open fields" decision was first announced by the United States Supreme Court in 1924, its rule has been accepted as a definitive statement of constitutional law since that date, and while its precedential underpinnings are questionable, that neither vitiates the clarity of the rule expressed therein, nor weakens the United States Supreme Court's declaration of the appropriate standard to be applied in gleaning evidence from the examination of "open fields." pp. 623, 624.

3. **Searches and seizures—"Open fields" doctrine—Hester rule—Validity not impaired by Katz (389 U. S. 347) or post-Katz cases.**
The United States Supreme Court's holding in *Katz* (analyzed herein) does not impair the validity of the *Hester* rule, but merely affords the protection of the constitution to a person wherever he may be and even if there is no technical trespass in a common-law property sense, hence, as made clear in post-*Katz* cases, that rule is still a viable authority to validate search of open fields, which remains beyond the ambit of the amendment's protection. pp. 625–628.

4. **Searches and seizures—United States Supreme Court's present subjective test—"Papers and effects" within the curtilage—When not protected against seizure.**
Under the subjective test presently applied by the United States Supreme Court in search and seizure cases, it now

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appears that one who places "papers and effects" within the curtilage in an area open to the public will not be protected against a search and seizure unless the circumstances spell out a subjective and reasonable expectation of privacy despite the semipublic nature of the area within the curtilage. p. 630.

5. Searches and seizures—United States Supreme Court's present subjective test—Search within the curtilage—Expectation of privacy—Accused's burden.
Since under the strict subjective test, a person is given less protection than under the earlier rule, the government is no longer obliged to rely on the "plain view" or waiver doctrine on which it had the burden of proof if it wished to search the curtilage, but the burden shifts to the accused who must now show, inferentially at least, a subjective and reasonable expectation of privacy if the curtilage is accessible to the public. pp. 630, 631.

6. Criminal law—Homicide—First-degree murder—Searches and seizures—Recovery of victim's body within curtilage—No reasonable expectation of privacy.
Defendant's conviction of murdering his wife, whose body was uncovered during his absence by the sheriff (after digging at random 14 to 15 holes with a backhoe and scraper) buried under a rock pile located 450 feet from their home but within the farm property, consisting of heavily wooded, unfenced land, is not invalidated because the body was found in an open field, an area not constitutionally protected—the "reasonable expectation of privacy" rule not being applicable to this situation. pp. 622, 623, 634.

7. Searches and seizures—Exclusionary rule—Exceptions and qualifications—Consequent lack of efficacy.
The supreme court deprecates the refined distinctions made by courts in applying the judge-made exclusionary rule with its myriad exceptions and qualifications, which has been mandated upon the states, not by the fourth amendment but under superintending power, and points out particularly its lack of efficacy in that it not only fails to protect innocent people against incursions into their private rights, but permits the guilty to escape the rehabilitative and punitive aspects of our criminal law. pp. 634–639.

8. Criminal law—Homicide—First-degree murder—Evidence—Sufficiency.
Defendant's conviction of first-degree murder of his wife, who met her death as a result of being shot with a high-powered

hunting rifle of a kind he was known to possess, is amply supported by the record revealing a history of marital discord and violent altercations, an incipient affair with a married woman while his wife was alive, his discrepant accounts, given various people, of her alleged departure and whereabouts, which was followed by his departure from the homestead and subsequent cohabitation with his paramour at the times prior to his arrest. pp. 639, 640.

HALLOWS, C. J., dissents.

ERRORS to review a judgment and an order of the circuit court for Washburn county: ALLEN KINNEY, Circuit Judge. *Affirmed.*

The defendant, Dennis E. Conrad, after a trial by jury, was found guilty of the first-degree murder of his wife, Marie. He was sentenced to life imprisonment.

Subsequent to sentence, the defendant moved for a new trial. His motion recited that he had been convicted as the result of the receipt of evidence that should have been excluded and that the evidence was insufficient to sustain the verdict. The motion was denied. Separate writs of error were issued by this court to review the judgment and to review the order denying the motion for a new trial.

Marie Conrad was last seen alive on May 16, 1972, at her home near Spooner, Wisconsin. One of the Conrad teen-age daughters testified that as she was leaving for school on that morning she saw her mother still in bed.

In mid-morning, Dennis Conrad picked up his partner, Jerry Blair, and told him that he had taken Marie to Trego, where she caught a bus. During the afternoon, Conrad called the Spooner Hospital, where his wife worked as a practical nurse, and told the supervisor that Marie would not be at work for the rest of the month because she had gone to Germany to visit her critically ill mother.

When the children returned from school, they were told by Conrad that their mother had gone to Germany. The same account, with great elaboration, was given to

Marie's friend, Elsie Rich, who telephoned Dennis Conrad on the evening of the 16th. The same tale was recounted to several different people in the Spooner area.

About two weeks thereafter, however, Conrad stated that his wife had left him and gone to California. He produced a letter purporting to come from Marie in California. Several persons saw the letter but only one person, a Conrad daughter, Elizabeth, remembered seeing a California postmark. Conrad explained this changed story on the ground that he did not want his children, or anyone else, to know until after the end of the school year that Marie had left them.

At about this time, Sheriff Anderson asked Conrad to come into his office because of the persistent reports that Marie was missing. Conrad came in on June 6, 1972, and explained that he had taken Marie to catch the bus at Trego. He showed him the letter purportedly from Marie in which she stated that she was leaving Dennis and the girls for good. Apparently, this, for the time being, satisfied the sheriff. About six weeks later, however, the sheriff again asked Conrad to come into the office, but he did not do so.

During the period after May 16, 1972, Dennis Conrad told a number of discrepant stories about Marie's whereabouts. He also told various people that Marie had taken the money in a bank account. Conrad's statement of the amount taken varied from $11,000 to $48,000.

During this period Conrad's affection for Carol Wallace, a married woman, was noticed; and early in August, Conrad left the homestead and went to South Dakota with Carol. Prior to leaving, he listed the house and the 40-acre farm for sale. Before leaving, he admitted to several persons that he and Marie had marital troubles.

Conrad and Carol Wallace were living together in South Dakota and Iowa at times prior to the time of Conrad's arrest.

Although the record reveals that the sheriff was unaware of the discrepant stories that Conrad had told to explain Marie's absence, he continued to be suspicious. After July, he visited the Conrad farm on several occasions to look around.

The Conrad farm consisted of about 40 acres of unfenced land. A portion of it was heavily wooded. The house was set back from the road a distance of 150 feet. Several doghouses were located just north of the house. Two hundred feet north was another structure known as a pigeon building. The horse barn was 30 to 40 feet northeast of the pigeon building. Two hundred feet further north, approximately 450 feet from the house, was a pile of rocks. The body of Marie Conrad was found buried in the earth under this pile of rocks. The rock pile was located in a clearing and was about 100 yards from the road. It was not visible from the road.

Sheriff Anderson knew that Conrad had left Spooner and believed that he had left the state.

On October 22, 1972, he went on the farm, looked around, and prodded the earth with a ski pole. It was on this day that he decided to secure a backhoe and scraper to dig for the body of Marie on the Conrad farm.

The machine arrived at the Conrad farm on the 26th of October. The operator dug at places directed by Sheriff Anderson.

The search commenced by moving some of the doghouses adjacent to the house, and digging several holes two or three feet deep.

Holes were then dug in the vicinity of the pigeon building. A pile of discarded siding was moved and the earth beneath it dug up. Several holes were dug in the vicinity of the horse barn.

The operator of the machine was then directed to bulldoze the rock pile and to dig under it. This rock pile, 14 or 15 feet in diameter and about two to three feet high, was moved to one side, and the body of Marie was

found buried in the earth at a depth of two to three feet. This discovery took place at about 11 a. m. on October 26, 1972, after about 14 to 15 holes were dug at random in the earth from the doghouses near the house to 450 feet north, where the body was discovered.

The Wisconsin state crime laboratory was called and completed the exhumation. The coroner found that death had been caused by a bullet from a high-powered rifle. He gave the opinion that the body had been in the earth from three to six months at the time of exhumation.

Following the discovery of the body, a warrant was issued for a search of the Conrad home and the adjacent outbuildings.

A warrant for the arrest of Conrad was issued, and he was returned to Wisconsin and charged with the first-degree murder of his wife and bound over for trial.

Prior to trial, defense counsel moved to suppress the evidence of Marie's body and the evidence that was discovered on October 27th pursuant to warrant.

Counsel contended that the search was illegal, was a trespass, and was made without probable cause. He argued also that the search the next day pursuant to warrant should also be suppressed, because the facts that gave probable cause for the issuance of the warrant were based on the exploitation of the illegal bulldozer search of the Conrad property.

Judge KINNEY denied the motion to suppress. He found that there was no probable cause for a search of the farm, that Sheriff Anderson did not have information sufficient to secure a search warrant, and that he merely acted on a "hunch."

He held, however, that the area where the body was found was an "open field" and that probable cause for the search was not required.

He rejected counsel's argument that the "open fields" doctrine was no longer applicable. Relying upon the cases decided by the Wisconsin Supreme Court he said:

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"The real question is, shall we add to the restrictions on law enforcement officers and say that they cannot search open fields and woods unless they have probable cause to find evidence of a crime there."

The case proceeded to trial. Conrad was found guilty, and a judgment of life imprisonment was imposed. A motion for a new trial was denied. The appeal is from the judgment and the denial of the new trial motion.

For the plaintiff in error there was a brief by *Robert O. Weisel* and *Cameron, Shervey & Weisel*, all of Rice Lake, and oral argument by *Robert O. Weisel*.

For the defendant in error the cause was argued by *Robert D. Martinson*, assistant attorney general, with whom on the brief was *Robert W. Warren*, attorney general.

HEFFERNAN, J. Conrad argues on this appeal, as he did at trial and at the hearing on the motion to suppress evidence, that the finding of the body of Marie should be excluded because the body was buried under the rock pile in the "reasonable expectation of privacy." Thus, it is reasoned that the situation in the instant case is one that is afforded the protection of the fourth amendment to the Constitution of the United States and the identical provision of the Wisconsin Constitution.

The reasoning is arguably derived from *Katz v. United States* (1967), 389 U. S. 347, 88 Sup. Ct. 507, 19 L. Ed. 2d 576. The *Katz* rationale was restated in *Terry v. Ohio* (1968), 392 U. S. 1, 9, 88 Sup. Ct. 1868, 20 L. Ed. 2d 889:

"We have recently held that 'the Fourth Amendment protects people, not places,' . . . and wherever an individual may harbor a reasonable 'expectation of privacy,' *id.*, at 361, . . . he is entitled to be free from unreasonable governmental intrusion."

A case decided by this court also relied upon the test of *Katz-Terry*. In *Ball v. State* (1973), 57 Wis. 2d 653, 205

N. W. 2d 353, we held illegal a warrantless search of a garbage can in which loot from a burglary had been placed. We said, "that the trash barrel was within defendant's expectation of privacy and the search of it was unlawful." (P. 664)

In the case before us it cannot be doubted that whoever buried Marie's body under the rock pile did so in the expectation that it would remain hidden. It was buried, *arguendo*, in the reasonable expectation of privacy.

Conrad argues that, if a body is concealed under those circumstances, a search could be undertaken only by warrant after a showing of probable cause.

If Conrad is correct, *i.e.*, that evidence was within the ambit of the Constitution's protection, a warrantless search, except in circumstances not applicable here, is unreasonable per se and the evidence of the body's discovery and the evidence gleaned by exploitation of the original search by the issuance of a subsequent warrant must be suppressed.

The doctrine (the reasonable expectation of privacy) upon which Conrad relies is in contradistinction to the state's reliance upon the "open fields" doctrine which permits a warrantless search under some circumstances.

The "open fields" doctrine was first stated by the United States Supreme Court in *Hester v. United States* (1924), 265 U. S. 57, 59, 44 Sup. Ct. 445, 68 L. Ed. 898. Therein Mr. Justice HOLMES said:

". . . the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 Bl. Comm. 223, 225, 226."

The *Hester Case* originated in a revenue agent's stakeout of the home of Hester's father. Hester was seen from a distance of 50 to 100 yards handing a bottle to a person who was thought to be a customer for bootleg whiskey. Hester took alarm, went to his car, took a jug therefrom,

and ran through the fields. Both the bottle carried by the customer and the jug carried by Hester were thrown into an open field. Both broke, but each contained enough liquid so it could be determined that the liquid was bootleg whiskey. The broken containers were examined by revenue agents where they had been dropped.

The United States Supreme Court held that, even though there was a trespass, the evidence was not obtained by an illegal search or seizure. The court, although pointing out that the whiskey was "abandoned," rested its holding on the fact that the protectional umbrella of the fourth amendment does not cover "open fields."

The reliance of Mr. Justice HOLMES upon Blackstone has been criticized because the cited pages are concerned with the common-law distinction between burglary of a dwelling and a theft from distant out-buildings. Be that as it may, the rule of *Hester* has been accepted as a definitive statement of constitutional law since that date. The fact that its precedential underpinnings are questionable in no way vitiates the clarity of the rule expressed therein, nor does it weaken the court's declaration of the appropriate standard to be applied in gleaning evidence from the examination of open fields.

Unless *Hester* has been altered by the United States Supreme Court, or by this court, which can give even a greater constitutional protection than the United States Supreme Court would insist upon, *Hester* remains authoritative.

Under *Hester*, even though the sheriff in this case committed an outrageous trespass, the evidence of the corpse was admissible although the body was buried in the soil under a rock pile. The "open fields" doctrine is predicated on the theory that the protection of the fourth amendment is to "persons, houses, papers, and effects." Under that theory, the fourth amendment affords no protection to evidence either on or in the ground, unless

the particular area in question is so intimately related to a protected area that it can come within the concept of curtilage.

Under the "open fields" doctrine, the fact that evidence is concealed or hidden is immaterial. The area is simply not within the protection of the fourth amendment. If the field where the body was found does not have constitutional protection, the fact that the sheriff, rather than observing the evidence that might have been in plain view, dug into the earth to find the body and committed a trespass in so doing does not confer protection.

In *United States v. Brown* (5th Cir. 1973), 473 Fed. 2d 952, the "open fields" doctrine was applied to admit evidence that the F. B. I. obtained only by digging under a chicken coop in an open field.

In *Care v. United States* (10th Cir. 1956), 231 Fed. 2d 22, certiorari denied, 351 U. S. 932, 76 Sup. Ct. 788, 100 L. Ed. 1461, the "open fields" doctrine was applied to permit the introduction of evidence relating to the discovery of a still which was concealed in a cave about 125 yards from the house. The holding emphasized that it was the curtilage that was protected, that the protection of the fourth amendment against unreasonable search and seizure does not apply to an open field.

"Whether the place searched is within the curtilage is to be determined from the facts, including its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family."

Inferentially, the defendant concedes that if the "open fields" doctrine remains an acceptable rule of law, the search and seizure did not violate the constitution and the evidence was properly admitted.

Defendant urges that *Katz v. United States, supra,* sounded the death knell of the "open fields" doctrine, and

overruled, *sub silentio*, *Hester*. We do not see that such a broad sweep can be given to the language of *Katz*. *Katz* involved the eavesdropping on a telephone conversation—a wire tap on a phone booth that was apparently an isolated structure. In that case, the government argued that there was no violation of a constitutional right because there was *no physical intrusion* of any device into the booth. This argument was rejected on the reasoning of *Silverman v. United States* (1961), 365 U. S. 505, 81 Sup. Ct. 679, 5 L. Ed. 2d 734, that a technical trespass under property law was irrelevant to the question of fourth amendment protection—a position that was also stated in *Hester, supra*. In *Katz*, however, the trespass doctrine was definitively rejected. The court held that:

"The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which *he* justifiably relied while using the telephone booth and this constituted a 'search and seizure' within the meaning of the Fourth Amendment." (Emphasis supplied.) (P. 353)

What *Katz* emphasized is the right of a person—the caller from the phone booth—to be secure from an unreasonable search and seizure, the interception of his conversation. *Katz* spells out the not very novel idea that a person, clearly protected by the constitution, is afforded the protection of the constitution wherever he may be, and that protection is afforded even if there is no technical trespass in a common-law property sense. Once it was conceded, as the majority of the United States Supreme Court has, Mr. Justice BLACK notwithstanding, that a verbal communication is a "thing" subject to seizure, the *Katz* ruling was inevitable. Where the person was when he uttered the "seized" statement is irrelevant and the person's utterance is protected. True, as *Katz* makes clear, he could waive the right by evincing an election not to keep his utterances private—an election clearly not made when calling from a closed telephone booth. Hence the language:

". . . the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz*, page 351.

The importance of *Katz* is not that it spreads the umbrella of the fourth amendment to a telephone booth, but that it foretold the possibility that, even in a place traditionally thought to be an area protected by the fourth amendment, protection would not be afforded in the absence of a subjective intent to exercise a reasonable expectation of privacy. The concept of a protected area remains. A home is such an area, and so is the curtilage surrounding a home; but as noted in *Katz* (fn. 9, p. 351), the United States Supreme Court has "never suggested that this concept can serve as a talismanic solution to every Fourth Amendment problem."

The concurring opinion of Mr. Justice HARLAN interpreted the majority in *Katz* (p. 361) as merely holding that a telephone booth was "a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable." Mr. Justice HARLAN contrasts the telephone-booth situation with a conversation in the open where there would be no expectation of privacy. For this proposition he relied upon and cited *Hester, supra*, whose holding was not challenged in the majority opinion. The majority simply distinguished the situation in *Katz* from that of *Hester* and found, in effect, that the "open fields" doctrine was not factually applicable. The viability of *Hester* was not weakened by the holding of *Katz*.

In 1968, the United States Supreme Court decided *Terry v. Ohio* (1968), 392 U. S. 1, 88 Sup. Ct. 1868, 20 L. Ed. 2d 889, and referring to the language of Mr. Justice HARLAN, concurring in *Katz*, stated:

"We have recently held that 'the Fourth Amendment protects people, not places' . . . and wherever an individual may harbor a reasonable 'expectation of privacy'

. . . he is entitled to be free from unreasonable governmental intrusion. . . . Unquestionably petitioner was entitled to the protection of the Fourth Amendment as he walked down the street in Cleveland." (P. 9)

It was not Katz, however, that mandated that conclusion. That was old and accepted law. Among the six cases cited for that proposition was *Carroll v. United States* (1925), 267 U. S. 132, 45 Sup. Ct. 280, 69 L. Ed. 543, a case decided more than twenty years earlier.

Terry also stands for the proposition that: Where a person is, there also is the protection of the fourth amendment. That consideration is totally irrelevant to the question of whether a subjectively displayed desire to conceal evidence in an open field casts about the concealment the constitutional shield of the fourth amendment.

Neither *Katz* nor *Terry* overrule *Hester*. The statement that the fourth amendment protects persons and not places reinforces the position of Mr. Justice HOLMES in *Hester* that a place is not per se protected against an unreasonable search and seizure. An open field remains beyond the ambit of the fourth amendment's protection. A search may be made there without a warrant and without probable cause, and that which is found will not be suppressed by the courts.

It is noteworthy that Mr. Justice WHITE, who differed with the majority in *Katz* only to the extent that he would permit wiretapping by the president or the attorney general in national security cases, and agreed with the *Katz* rationale, cited *Hester* in his concurrence to *Coolidge v. New Hampshire* (1971), 403 U. S. 443, 513, 91 Sup. Ct. 2022, 29 L. Ed. 2d 564, almost four years after counsel argues that its doctrine was put to rest by *Katz*.

In *Cady v. Dombrowski* (1973), 413 U. S. 433, 450, 93 Sup. Ct. 2523, 37 L. Ed. 2d 706, the United States Supreme Court referred to *Hester* as a viable authority to validate an open field search.

It is clear, therefore, that *Hester* lives, and allows a search without a warrant, even though, as in the instant case, there was a trespass.

What then is the effect of *Katz* if not to replace the "open fields" doctrine of *Hester?* As applied by other courts, it appears to be a modification of the curtilage rule. This is illustrated by *Wattenburg v. United States* (1968), 388 Fed. 2d 853, a post-*Katz* case.

In *Wattenburg,* Christmas trees, some of which were allegedly cut on a government forest preserve, were stacked with other cut trees *"immediately adjacent"* to the lodge where the defendant Wattenburg lived. A search was made without a valid warrant. The government argued that the search was free of the restraints of the fourth amendment because it took place in an "open field." The court acknowledged the "open field" rule of *Hester* and stated:

". . . the 'open field' doctrine has been uniformly recognized and applied where, *under the facts of a particular case,* it was held that the search and seizure had occurred in an open field." (Emphasis supplied.) (P. 856)

The court went on to quote with approval the application of the *Hester* doctrine in *Care, supra,* and other Federal cases where the searches were conducted at distances of 100 feet to a half a mile from the residence. Those situations the court contrasted to the facts before it, where the trees were "immediately adjacent" to the dwelling.

It held that the search took place within the curtilage as defined, *supra,* in *Care, supra.* The court held that, as a search within the curtilage, it was illegal in the absence of a warrant based on probable cause. This was the holding of *Wattenburg.* As dicta, in the opinion of this writer useful and instructive dicta, the court in *Wattenburg* added that a more appropriate test was:

"[W]hether [the search] constitutes an intrusion upon what the resident seeks to preserve as private even in an area . . . *adjacent to his home*, is accessible to the public." (Emphasis supplied.) (P. 857)

On this test also the search of the *curtilage* was held to be a violation of the fourth amendment.

Hence, it appears that the rule of *Katz*, as explained by *Wattenburg*, is an explication or modification based on present-day concepts of the ancient curtilage test. It is also a limitation of it. Under the strict curtilage test, the subjective element of a reasonable expectation of privacy was omitted. There was, in effect, a legal presumption that all within the curtilage was protected.

The principle was well stated by William Pitt when speaking in the House of Commons in 1763 on the Cyder Tax. While asserting that every man's house is his castle, he said:

"The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter!—all his force dares not cross the threshold of the ruined tenement!" (Quoted in McNamara, *2,000 Famous Legal Quotations*, p. 515)

Under the subjective test, it now appears that one who places "papers and effects" within the curtilage in an area open to the public will not be protected against a search and seizure unless the circumstances spell out a subjective and reasonable expectation of privacy despite the semipublic nature of the area within the curtilage.

Despite the language of *Katz* that heroically asserts that the fourth amendment "protects people, not places," the fact is that the *Katz* rule as interpreted in *Wattenburg* and as it must, apparently, be applied in the future, gives less protection to the person than the earlier rule. It represents an encroachment upon the umbrella of protection that heretofore was afforded to "papers and

effects" within the curtilage. It shifts the burden of proof to the accused, who must now show, inferentially at least, a subjective and reasonable expectation of privacy if the curtilage is accessible to the public. Heretofore, the government, if it wished to search the curtilage, was obliged to rely on "plain view" or waiver doctrine, doctrines on which it had the burden of proof.

Katz and *Wattenburg* represent limitation of the scope of the constitutional protection of the individual. *Katz* makes sense, to the degree that, where a person is, there is his castle, to be protected from governmental intrusion. It was clear in *Katz* that the person making the phone call had momentarily at least elected, under circumstances where it was reasonable to so elect, to make the phone booth a place of privacy for *his* person and his conversations. It was a place where the "King of England cannot enter" either by a trespass or by a surreptitious or physically intrusive electronic bug.

Katz, if applied in all cases in the manner urged by the defendant in this case, does not further personal liberty; it constrains it. Only if *Wattenburg* and its progeny are interpreted to be a restriction on the "plain view" doctrine can it be arguably asserted that greater protection is offered. Under *Wattenburg*, it is conceivable that what is in "plain view" will nonetheless be protected because it was placed there with a reasonable expectation of privacy. On the other hand, the *Wattenburg* test is a subjective one, and the placing of a "thing" where it will be revealed by a plain view is evidence that there was no expectation of privacy.

The clear import of a series of California cases discussing *Katz* is the same. *People v. Edwards* (1969), 71 Cal. 2d 1096, 80 Cal. Rptr. 633, 458 Pac. 2d 713, involved the warrantless search of trash cans located *two or three feet from the back porch* of the defendant. It was held that the cans were constitutionally protected because

there was a reasonable expectation of privacy and the marijuana "was not visible [no plain view] without 'rummaging' in the receptacle." (P. 1104) *Edwards* cited *Hester* and distinguished it on the fact that in *Hester* the whiskey was at a distance from the dwelling.

In *People v. Bradley* (1969), 1 Cal. 3d 80, 81 Cal. Rptr. 457, 460 Pac. 2d 129, the California Supreme Court upheld a warrantless search and seizure of marijuana plants in the defendant's backyard. There again the court cited with approval the *Hester* "open fields" doctrine, and criticized not the doctrine but only its occasional misapplication, saying it "does not afford a solution to every case involving a claim of an illegal search and seizure." (P. 84)

The California court in *Bradley* found that the "open field" test was not appropriate to the *facts* before it. It pointed out that the marijuana plants were within 20 feet of the defendant's back door, where they could be seen by tradesmen and delivery persons. They were not covered by an opaque material and "at least part of the plants were in plain sight" (P. 85) of anyone who approached. The situation was (by a citation to *Hester*) specifically contrasted to the "open fields" doctrine set forth herein.

Mr. Justice TOBRINER dissented on the factual basis that there was not a "plain view" unless the viewer approached to within one foot of the marijuana plants, and, hence, the householder was protected by a reasonable expectation of privacy within his enclosed yard. Mr. Justice TOBRINER pointed out, that this case dealt not with "open fields," but with "the yard adjacent to a private residence." Only if the plants were in plain view of a person in the public area of the curtilage did he feel the seizure would have been justified.

A recent case of this court, *Ball v. State* (1973), 57 Wis. 2d 653, 660, 205 N. W. 2d 353, pointed out the

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viability of the rule of *Hester*. It highlighted the limited scope of *Katz* and its progeny. The "expectation of privacy" test was pointed out to be pertinent only in determining "whether a search and seizure *adjacent* to a house is constitutionally protected." (Emphasis supplied.) (P. 661) It recognized the protection of the fourth amendment afforded to the area adjacent to the house where the placing of allegedly stolen articles in a garbage can just to the rear of the house demonstrated the defendant's reasonable expectation of privacy, and contrasted the facts to instances where objects were in "public view." (P. 662)

A per curiam opinion of this court, *Watkins v. State* (1973), 59 Wis. 2d 514, 208 N. W. 2d 449, held that an officer could conduct a search of a common storage room of an apartment house (clearly within the curtilage) without violating the defendant's fourth amendment rights. This court said that in such common room accessible to all the defendant "could harbor no expectation of privacy." (P. 514) Again *Watkins* demonstrates that the extension of the *Katz* rule permits inroads upon the protection of the curtilage unless there is a subjective demonstration of a reasonable expectation of privacy.

The law in Wisconsin in respect to "open field" searches in areas away from the curtilage remains unchanged. No warrant is required for a search, and police officers may search such areas above or below the ground undeterred by the fourth amendment.[1]

[1] While no protection is afforded by the fourth amendment, an intrusion such as was made in the instant case would constitute a trespass punishable by law. Certainly such random digging of another's property as performed by Sheriff Anderson should not be approved, but the disapproval of a trespass and sanctions for it must come from other aspects of the fourth amendment than the exclusionary rule. *See Bivens v. Six Unknown Federal Narcotics Agents* (1971), 403 U. S. 388, 91 Sup. Ct. 1999, 29 L. Ed. 2d 619, for a discussion of other remedies.

In respect to the curtilage, the law has been changed by *Katz* except where a waiver of the right of privacy has been demonstrated. Where there is demonstrated a reasonable expectation of privacy, there can be no search in the curtilage except upon warrant issued upon probable cause. Hence, had the body been revealed by the search immediately adjacent to the house—in the excavation under the dog pens—the evidence of the body would have to be suppressed. Only were the evidence in plain sight within the curtilage or were there some subjective showing of waiver would the necessity for a warrant be obviated. To that extent, the protection of the fourth amendment in respect to searches within the curtilage has been reduced.

We hold, therefore, that the evidence of the finding of the body of Marie Conrad in the open fields approximately 450 feet from the house was properly admitted into evidence.

This protracted discussion of hair-splitting distinctions demonstrates the truth of Mr. Justice REHNQUIST's statement in *Dombrowski, supra*, p. 440, that "this branch of the law is something less than a seamless web." The United States Supreme Court has made the law of search and seizure almost as incomprehensible as the law of obscenity. The decisions of the supreme court, of the lower federal courts, and of this court have made possible a deluge of legal legerdemain which may be exercised whenever a court either wishes to sustain a search or to reject it.

There is a theory to fit almost any preference. Rules of reasonableness can be tailored to fit almost every variation of reasoning.

The rule that requires that illegally seized evidence be excluded has, by virtue of the labyrinthine qualifications and exceptions, itself become suspect, not because it does not possess merit, but because its efficacy is doubtful.

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The rationale of the exclusionary rule is twofold:

"[1] . . . to deter unlawful or undesirable or unconstitutional police conduct, and [2] to insure some integrity in the judicial process by not having the judicial process sanction, approve and be party to constitutional violations or undesirable or unlawful police conduct in allowing evidence to be used notwithstanding the manner in which it was seized." Santarelli, 61 Fed. Rules Decisions 273 (March, 1974).

Only if a prosecution is commenced, however, and a case brought to court is it even possible to invoke the judicial sanction of the exclusionary rule, and then only to the benefit of those who would arguably be found guilty were the evidence admitted.

The sanction cannot apply if the person who is the subject of an illegal search is either deemed innocent, because no evidence is found, or if, as a matter of police policy, the decision is not to prosecute. An "undesirable" person who is hassled by searches and seizures that are calculated for the purpose of "leaning on" or harassing him is afforded no protection by the exclusionary rule. Police misconduct is not prevented. Police hassling can continue unaffected by the strictures of the fourth amendment. A guiltless person who is the subject of a grossly intrusive and illegal search can be afforded no relief by the exclusionary rule.

Thus, the penalty that is assessed by the invocation of the exclusionary rule is not an assurance that there will be no police misconduct, it is merely an assurance that society will be penalized by its inability to use relevant evidence to punish crimes committed against society and the state.

Courts and judges should not sanction violations of the constitution. The integrity of the judicial process must be inviolate and free from reliance upon transgressions against the constitution which every judge has taken the

oath to uphold, but is this good purpose enhanced by the exclusionary rule?

While it is clear that the constitution by the fifth amendment forbids the use of self-incriminating evidence, and does so in specific terms, no such sanction is mandated upon the courts by the fourth amendment. The exclusionary rule is a judge-made one in furtherance of conduct that courts have considered to be in the public interest and to suppress conduct that is not. Certainly the integrity of trial courts as searchers for the truth is seriously compromised if they are required by appellate court rules having their genesis, not in the constitution, but in the grant of superintending powers to suppress relevant evidence of guilt and permit the guilty to escape the rehabilitative or punitive aspects of our criminal law—unless there is the clear assurance that the exclusionary rule is accomplishing its purpose to prevent future transgressions of the fourth amendment and to impose discipline for past offenses.

In the instant case had the search by Sheriff Anderson revealed no corpse, a prosecution would not have been brought. Assuming *arguendo* that the victim of the sheriff's "hunch" is innocent, he would find his outbuildings knocked over, holes dug at random near his home and in his fields, and the marks of heavy machinery on his land, but since no prosecution had been brought, he would be remediless.

In the instant case we conclude that the search was not impermissible under the fourth amendment. Yet a wrong, a clear trespass, was committed, but no remedy of any value has been established by the courts to right this wrong. We need shed no tears over the plight of the defendant in this case, but our preoccupation with the exclusion of illegally obtained evidence that is highly probative of guilt has blinded courts and legislatures to wrongs that may be done those who are clearly innocent. The exclusionary rule does not protect their privacy. Its

purpose, though noble, is simply not effectuated when it can only be made to apply against society for the benefit of the arguably guilty.[2]

To question the exclusionary rule is, however, to open a Pandora's box of substitutes. Those who are likely to be hassled by police conduct are the persons least likely to resort to the courts for redress of grievances. To enforce any control over police conduct, absent the exclusionary rule, may require extensive and undesirable administrative controls over police conduct and that of an elected public officer. To prevent police incursions against private rights, the establishment of administrative tribunals either within or without the law enforcement structures have been suggested. Criminal penalties against police officers who conduct illegal searches is another proposed alternative.

To conclude as this court does that the exclusionary rule is a weak reed indeed to enforce the fourth amendment is not to suggest a specific replacement for it. At this stage of our legal history when the exclusionary rule has been given statutory sanctions, its repeal or change is an obligation of the legislature. In addition, of course, the rule is mandated upon all states by *Mapp v. Ohio* (1961), 367 U. S. 643, 81 Sup. Ct. 1684, 6 L. Ed. 2d 1081. Accordingly, this court is not now free to overrule *Hoyer v. State* (1923), 180 Wis. 407, 415, 193 N. W.

[2] The concurring opinion misunderstands the majority's concern about the exclusionary rule.

The problem is that the application of the exclusionary rule fails to assure the protection against unlawful search and seizure that is the promise of the fourth amendment.

The real world is not the world of the courtroom alone. The rights of innocent people to privacy are not protected by judicial exclusion of inculpatory evidence when there is no such evidence and no prosecution is brought. Yet violations of privacy may continue unchecked by the exclusionary rule, which can only be a sanction against the state in a prosecution against the arguably guilty. The instant case highlights the impotency of the exclusionary rule to prevent illegal trespasses and invasions of privacy.

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89. It is clear, however, that the price paid by society by the invocation of a fourth amendment exclusionary rule is high indeed. If the rule prevented illegal searches, or even clearly tended to discourage them, there would be a substantial justification for the rule, but there is no evidence that society receives this *quid pro quo* for the dismissal of charges against the guilty.

Dean Wigmore foresaw in 1922 (*Using Evidence Obtained by Illegal Search and Seizure*, 8 A. B. A. Journal 479) the path down which the exclusionary rule of *Boyd v. United States* (1886), 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, and *Weeks v. United States* (1914), 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, would lead us. He said (P. 484):

"The doctrine of Weeks v. United States also exemplifies a trait of our Anglo-American judiciary peculiar to the mechanical and unnatural type of justice. The natural way to do justice here would be to enforce the splendid and healthy principle of the Fourth Amendment directly, *i. e.*, by sending for the high-handed, overzealous marshal who had searched without a warrant, imposing a thirty-day imprisonment for his contempt of the Constitution, and then proceeding to affirm the sentence of the convicted criminal. But the proposed indirect and unnatural method is as follows:

" 'Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you *both* go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else.' "

"Some day, no doubt, we shall emerge from this quaint method of enforcing the law. At present, we see it in many quarters. It will be abandoned only as the judiciary

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rises into a more appropriate conception of its powers, and a less mechanical idea of justice."

The effect of the exclusionary rule in practice was succinctly stated by Cardozo in *People v. Defore* (1926), 242 N. Y. 13, 21, 150 N. E. 585, "The criminal is to go free because the constable has blundered." Ought that be the remedy?

Once it is concluded as we do that the evidence of the discovery of Marie Conrad's body was properly before the jury, the question remains, was the evidence sufficient to sustain the jury's verdict of murder in the first degree? The defendant's brief concedes circumstantial evidence of the defendant's guilt and disputes only the body-discovery evidence.

The record reveals a history of marital discord and violent altercations. There was evidence of an incipient affair with Carol Wallace. Conrad was the last to see Marie alive, and his discrepant accounts of her departure and her whereabouts lead to the inference that he was attempting to dissemble. Marie met her death as the result of being shot with a high-powered hunting rifle, a kind of rifle that Conrad was known to possess. Under this state of evidence, the jury could conclude that Conrad had intentionally killed his wife Marie.

Defendant argues, however, and it is almost his only argument, that the facts demonstrate that he could not have placed Marie's body under the rock pile because when he left Wisconsin on August 7, 1972, there were two rock piles on the farm and when the body was discovered the rock piles had been consolidated into one pile over Marie's grave. There was evidence that on August 19th a deputy sheriff saw two separate rock piles on the property. The assumption made by the defendant is that whoever incorporated the rocks into one pile committed the murder and buried the body. Thus, according to the theory of Conrad, the body was placed

under the rock pile after August 19th, only two months before its discovery. In contrast to this theory, Dr. Olson, the coroner, testified that the body had been in the grave for a minimum of three months and a maximum of six months. This testimony was not disputed and the jury was entitled to believe it. The jury could conclude that the body had been in the earth at least by July 26th and perhaps earlier. It is undisputed that Conrad was on the farm at that time. Under this view of the evidence, which the jury was entitled to believe, whether there was one rock pile or two was immaterial. The evidence was sufficient to sustain the verdict.

By the Court.—Judgment and order affirmed.

WILKIE, J. *(concurring).* I agree that the evidence of the finding of the body of Marie Conrad was properly admitted. However, I disagree with the majority's dicta criticizing the exclusionary rule.

In essence, the exclusionary rule is one of the manifestations demonstrating the degree of civilization we have achieved in developing our democratic society. Ours is a government of laws, not of men, it is often said, and in the exclusionary rule we have a positive demonstration of our willingness that the government will not profit while it breaks the law and thus breeds contempt for the law. Mr. Justice BRANDEIS said in his dissent in *Olmstead v. United States:*

". . . In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." [1]

As recently as five years ago, Mr. Chief Justice WARREN, speaking for the court in *Terry v. Ohio* [2] said:

[1] (1928), 277 U. S. 438, 485, 48 Sup. Ct. 564, 72 L. Ed. 944.
[2] (1968), 392 U. S. 1, 12, 13, 88 Sup. Ct. 1868, 20 L. Ed. 2d 889.

". . . The rule also serves another vital function—'the imperative of judicial integrity.' *Elkins v. United States*, 364 U. S. 206, 222 (1960). Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions."

The essential justification for the exclusionary rule, which was fashioned by the United States Supreme Court as early as 1886 in *Boyd v. United States*,[3] and more fully in 1914 in *Weeks v. United States*[4] was very recently stated by three dissenting justices in the case of *United States v. Calandra*,[5] wherein a majority of the United States Supreme Court held that the exclusionary rule in search and seizure cases does not apply to grand jury proceedings. The dissenting justices, vigorously defending the exclusionary rule, observed:

". . . The exclusionary rule, if not perfect, accomplished the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government." [6]

Our Wisconsin Supreme Court adopted the exclusionary rule with respect to Wisconsin criminal proceedings in 1923 in *Hoyer v. State*.[7] In *Hoyer* the court, in discussing art. I, sec. 11, of the Wisconsin Constitution—the constitutional identical counterpart of the United States Constitution's fourth amendment—stated:

"Sec. 11, art. I, Wis. Const., *supra*, is a pledge of the faith of the state government that the people of the state,

[3] (1886), 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746.
[4] (1914), 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652.
[5] (1974), 414 U. S. 338, 94 Sup. Ct. 613, 38 L. Ed. 2d 561.
[6] *Id.* at page 357.
[7] (1923), 180 Wis. 407, 417, 193 N. W. 89.

all alike (with no express or possible mental reservation that it is for the good and innocent only), shall be *secure* in their persons, houses, papers, and effects against unreasonable search and seizure. This security has vanished and the pledge is violated by the state that guarantees it when officers of the state, acting under color of state-given authority, search and seize unlawfully. The pledge of this provision and that of sec. 8 [Prosecutions; second jeopardy; self-incrimination; bail; habeas corpus.] are each violated when use is made of such evidence in one of its own courts by other of its officers. That a proper result—that is, a conviction of one really guilty of an offense—may be thus reached is neither an excuse for nor a condonation of the use by the state of that which is so the result of its own violation of its own fundamental charter. . . ."

Law enforcement personnel of the federal government and here in Wisconsin have operated under the exclusionary rule for over half a century. There has been no collapse of either the federal or Wisconsin local law enforcement machinery. The majority admits that there is difficulty with all the known alternatives to the exclusionary rule. Although there are difficulties in operating under that rule, the exclusionary rule is not only required by our Wisconsin case of *Hoyer* [8] and in fact as the majority states "has been given statutory sanctions," [9] but is also mandated by *Mapp v. Ohio*.[10]

A recent commentator, discussing the exclusionary rule, said:

". . . If constitutional rights are to be anything more than pious pronouncements, then some measurable consequence must be attached to their violation. It would be intolerable if the guarantee against unreasonable search and seizure could be violated without practical consequence. It is likewise imperative to have a practical procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of

[8] *Supra*, footnote 7.

[9] *E.g.*, sec. 971.31 (2), Stats.

[10] (1961), 367 U. S. 643, 81 Sup. Ct. 1684, 6 L. Ed. 2d 1081.

those rights. The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees. By demonstrating that society will attach serious consequences to the violation of constitutional rights, the exclusionary rule invokes and magnifies the moral and educative force of the law. Over the long term this may integrate some fourth amendment ideals into the value system or norms of behavior of law enforcement agencies." [1]

I am authorized to state that Mr. Chief Justice E. HAROLD HALLOWS joins in that part of the concurrence which disagrees with the dicta criticizing the exclusionary rule.

HALLOWS, C. J. *(dissenting).* I think the search was illegal. The location on the defendant's farm was protected and was not an "open field" within the meaning of that doctrine. I cannot accept the proposition that a sheriff on suspicion can dig up a person's property with a backhoe or bulldozer, looking for evidence of crime. The majority opinion, while disapproving of what the sheriff did, apparently considers it was a reasonable search under the constitution. I also disagree with the dicta criticizing the exclusionary rule and in this respect agree with the concurring opinion of Mr. Justice WILKIE.

[1] Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. Chi. L. Rev. (1970), 665, 756.

APPENDIX 10

2 FOUND BODIES, DIDN'T TELL

Associated Press

Lake Pleasant, N. Y. -AP-

Lawyers for a man on trial for murder here said Wednesday that last September they found the bodies of two other persons murdered by their client but said nothing because of legal ethics.

Francis Belge and Frank Armani, court appointed lawyers for Robert Garrow, 38, also kept the information from the father of one of the victims when he visited them seeking information about his missing 21 year old daughter.

Syracuse Police Chief Thomas Sardino initiated an inquiry Thursday into the legality of the lawyers' action in withholding the discovery of the bodies.

The attorneys said they were not surprised by Sardino's action. "....but despite that risk we believe that anyone who walks into a lawyer's office has a right to believe that everything he says is privileged and confidential," their statement said.

Belge and Armani said they found the bodies of Susan Petz, 21, of Skokie, Ill., and Alicia Hauck, 16, of Syracuse in early September, some three months before they were discovered by others. They said Garrow's descriptions of the death scenes led them to the bodies.

Garrow is being tried in Hamilton County for the murder last July of Philip Domblewski, 18, of Schenectady. He confessed Monday to the 1973 Petz and Hauck murders and to the slaying of Daniel Porter, 22, of Concord, Massachusetts.

"I spent many sleepless nights over the inability to reveal the information, especially after Mr. Petz (Susan's father) came in from Chicago and talked with me," Belge said.

Belge said he and Armani wanted to notify the parents but "since it was a privileged communique, we could not reveal any information that was given to us in confidence at that time without the permission of the client, Garrow."

According to a number of legal authorities, the issue of what a lawyer should do when apprised by his client of criminal action is a gray area.

APPENDIX 10-2

LEGAL DILEMMA: MORALITY vs. ETHICS

by Alex P. Dobish
of the Journal Staff

The difficult question of morality and legal ethics have [sic] rarely clashed as sharply as they did last week when two attorneys for a man on trial at Lake Pleasant, N. Y. for murder, admitted that they had known since September about the bodies of two others allegedly slain by their client--but remained silent.

Twelve Milwaukee criminal defense lawyers were asked this week what they might have done under theoretically similar circumstances.

Five lawyers would have contacted authorities in one way or another.

The Milwaukee answers revealed that some lawyers depended on their consciences rather than the legal code.

"There is a time when your duty as a citizen over being a lawyer has to take over somewhere," said Joseph Tesch, retiring chairman of the Milwaukee Bar Association criminal law division.

Samuel J. Schrinsky, who said that as a general rule his lips would stay sealed on what was said between client and attorney, paused.

He would make an exception if the client "was going to do something about the government, like a bombing," he said.

And there were those who were adamant, who said they would adhere strictly to the rule of privacy that they said was as inviolable as that between a priest and penitent.

Among questions asked were:

If your client, currently charged with first degree murder, admitted the killing to you, would you tell police? (The universal answer was no because of the confidential client-lawyer relationship.)

This time the client has admitted to you that he has murdered two others whom authorities know nothing about. Under the circumstances, of one murder charged and two murders known only to the lawyer, would you reveal the other two bodies in some roundabout manner?

The lawyers were Franklyn M. Gimbel, Jack J. Gimbel (an uncle), William M. Coffey, James M. Shellow, James C. Wood, Dominic H. Frinzi, Robert J. Krome, Francis R. Croak, Robert Sutton, Schrinsky, Gerald Boyle and Tesch.

The question produced the thorniest answers. Five lawyers, Tesch, Sutton, Krome and both Gimbels--to a degree--said they would reveal where the other two bodies were.

"Yes, I think I would leak it," Tesch said. "Again, I haven't thought this problem through...But, an attorney shouldn't be in a position of hiding a crime and a body."

Sutton, a former assistant district attorney, said he probably would be condemned as a heretic for what he was to say:

"My conscience wouldn't allow me to do what the attorneys in Lake Pleasant did. The other alternative is to get out of the case."

He said he didn't know exactly how he would reveal the other two bodies, adding, "I don't think I would do it anonymously...but maybe you couldn't exclude out of hand that possibility."

Krome said he "absolutely would" make the other corpses known. "I would say it right out that I have that knowledge--but that I can't reveal the source of my knowledge."

RIGHT TO WITHDRAW

Jack Gimbel said that if a murder suspect confessed two more murders to him, he had no right to go to authorities, but he did have the right to withdraw. He said he would see the presiding judge and tell him that certain information had forced him to withdraw from the case. If the judge refused, Gimbel said, he would have to continue as attorney.

What would he do with that knowledge of the extra murders, though?

"I haven't given it thought," Gimbel said. "If what I did wouldn't reveal where I got the information, then maybe, yes, I would tell anonymously. I wouldn't tell where I got the information from."

Franklyn Gimbel, too, said he might tell.

"I might tell in a roundabout manner without attributing it to the client," said Gimbel, a former assistant US attorney.

"But I wouldn't tell police my client's admission or my client's involvement in those activities," he added.

Schrinsky, who said his "lips were sealed" when it came to the client-lawyer relationship, said only one exception would be made. He wouldn't reveal the bodies but would make known a plot against government, such as a bombing.

LEAK "EVIDENT"

"In that instance, unbeknown to anybody, I would disclose it to protect life," Schrinsky said. "In no other instance would I do it."

William Coffey, who said he would not leak the two extra killings, said: "An anonymous telephone call is evident to the client (when police pick him up) where the leak occurred if the murders had remained undiscovered for some time."

Croak, too, was among those who would be silent. He said:

"If I was convinced the information shouldn't be withheld and my client insisted on it being withheld, my only recourse would be to withdraw from the case," Croak said.

"No, the privilege is complete...It isn't up to lawyers to decide. If the courts and the legislatures think there should be an exception to this absolute privilege, they should say so."

Shellow said he wouldn't tell the DA about the other bodies unless his client was assured of immunity from prosecution or if he had his client's explicit authorization.

"It is essential that a client recognize what he tells his lawyer will be held in confidence," said Shellow, first vice president of the National Association of Criminal Defense Lawyers.

Said Boyle: "No sooner than a priest would reveal to a penitent's spouse the indiscretions of the penitent, would I speak. There is no difference from talking to a doctor or priest."

COULDN'T BE BROKEN

Wood and Frinzi said they felt the same--that the attorney-client relationship could not be broken.

In Lake Pleasant, the two lawyers who led to this examination, Francis Belge and Frank Armani, both court appointed attorneys, also kept the information of the other murders from one of the victim's fathers.

"I spent many sleepless nights over the inability to reveal the information, especially after...the father came in from Chicago and talked to me," Belge said.

Some legal authorities say there is a gray area in what a lawyer should do when apprised by his client of criminal action.

Meanwhile, some sort of an answer may come from the Onondaga County (where Lake Pleasant is located) Bar Association, which said it would ask the appellate division of the New York Supreme Court to investigate the actions of the two lawyers.

APPENDIX 11

SNOWMOBILER SHOT TO DEATH

By Loren H. Osman
of The Journal Staff

West Bend, WI---Lawrence Baier, a 50 year old farmer and roofer, was charged Saturday in the fatal shooting of an 18 year old snowmobiler driving on Baier's property.

The victim was Lawrence Frase Jr., the eldest of 11 children of Mr. and Mrs. Lawrence Frase Sr. The Frase and Baier homes are about two miles from each other in the Town of Addison, which is six miles west of West Bend.

Frase was killed about 1:20 a.m. Saturday by a three-eighths inch round shotgun slug that struck the left side of his face, authorities said.

STORY TOLD

This is believed to be the sequence of events, as pieced together from accounts by Washington County Sheriff Clarence A. Schwartz, Dist. Atty. James B. Schwalbach, the victim's father and others:

Frase and two companions, Gary Belunes, 18, of West Bend, and Gary Oakford, 19, of the Town of Addison, went snowmobiling on separate machines about 8:45 p.m. Friday.

Frase's father said the three often went riding together until early morning.

At 1:20 a.m., the three snowmobilers were traveling along Hillside Rd., which goes past the Baier farm.

Belunes and Oakford went ahead, but Frase swung onto Baier's property.

It reportedly was not the first time that snowmobilers had passed near the Baier home that evening.

Leroy Baier, one of Baier's sons, said the family has been having a problem with snowmobilers who did not stay on a trail that the family permitted a local snowmobile club to establish across their land, about 700 feet from their house.

Friday night, he said, there was constant snowmobile noise near the house from 8 p.m. to midnight, and the family had complained to the sheriff's department.

Hearing the sound of the Frase snowmobile in the early morning, Baier came out of his home carrying a 12 gauge shotgun.

While standing in his yard, he allegedly fired once, and a slug hit Frase in the face.

Frase's snowmobile continued on for some distance, eventually crashing against a shed.

APPENDIX 11-2
SNOWMOBILER SHOT TO DEATH

The track of the machine showed that it had come as close to the Baier home as 12 feet. However, it could not be determined exactly how far away it was when the shotgun blast was fired.

Frase's companions heard the shot and returned to the scene. The charge issued against Baier was based partly on their story, authorities said. Neither was injured.

The sheriff's department was summoned to the Baier farm by Baier's wife, Genevieve.

Coroner Robert Boltz declared the youth dead at the scene.

Baier was placed under arrest on a first degree murder charge. According to the written charge, he told deputies:

"I don't know why I did it. It just happened. The gun just went off."

Baier was released from jail Saturday afternoon after posting bail.

At the time of his death, Frase had been working as an assembler at the Gehl Co., a farm machinery firm in West Bend.

--Milwaukee Journal, December 30, 1973

APPENDIX 12

PROJECT INQUIRY HOMICIDE CASE MOCK TRIAL

State of Wisconsin, Plaintiff

v. Script (Prepared January, 1976)

Richard Starkey, Defendant

Participants in the trial:

Judge: A local attorney
Prosecutors: Two students selected from the class
Defense Counsel: Two students selected from the class
Jurors: Twelve (optional: six) students from the class
Defendant: Richard Starkey
Husband: Paul McCartney
Defendant's Girlfriend: Penny Lane
Police Officer: Sgt John Pepper
Witness: George Harrison

Prepared by:
Bryan A. Frame, II
Waukesha, Wisconsin

STATEMENT OF FACTS

The defendant, Richard Starkey, is charged with violating 940.09 Wisconsin Statutes, "Homicide by Intoxicated User of Vehicle or Firearm." For simplicity, the prosecution and defense have stipulated (agreed) that Linda McCartney, wife of Paul McCartney, died in the accident and that the death was the result of the accident. The judge shall instruct the jury as to this stipulation.

The prosecution will select students to play the roles of McCartney, Pepper, and Harrison. The defense will select students to play the parts of Starkey and Lane. Counsel may elect not to call one or more of its own witnesses, although opposing counsel may then call such witness (except the defendant).

The materials are adapted from Bennett v. State, 54 Wis. 2d 727 (1971), but substantial variances have been incorporated to permit greater latitude in the presentation of the case.

At the close of the trial, the judge shall instruct the jury, using Wisconsin Jury Instruction Nos. 100, 1185, 162, 140, 190, 160, and 515 in that order.

SCRIPT
Paul McCartney

My name is Paul McCartney. I reside at 1550 Indiana Lane, City of _____, Wisconsin. I am employed as a department store manager. My age is twenty-six.

On May 17, 197_, at approximately 7 P.M., my wife, Linda, my four-year-old daughter, and I were driving west on Highway ____, which is a six-lane divided highway in _____ County, Wisconsin. I was driving in the center lane at 45-50 m.p.h. As we reached the overpass of Hope Road, I felt a thud at the rear of the car and saw the bridge abutments come flying toward me. I lost control of the car at this point. I did not see the defendant's car strike my car.

The next thing I remember is waking up in the hospital, where a nurse told me, "Your wife is dead because of what that drunken fool did." The nurse also said she knew Starkey couldn't handle his liquor and drove "crazy" when he was drunk.

SCRIPT
George Harrison

My name is George Harrison. I live at 775 Elm Street, _____, Wisconsin. I'm married, thirty-two years old, and employed as a truck driver. In that job I drive about 60,000 - 70,000 miles per year, and I drive my own car about 25,000 miles per year. I've been a truck driver for about ten years.

On May 17, 197_, at 7 P.M., I was driving west on the entrance ramp to Highway ____ near Hope Road. As I was about to enter the highway, a green Buick passed me at about 45-50 m.p.h. I was traveling at 25 - 30 m.p.h. at that point. The Buick went over the crest of a slight hill ahead of me and suddenly a red Dodge passed me on the highway at a high rate of speed. I estimate it was traveling over 80 m.p.h. After it passed me, it began to slow down. A moment later I saw a cloud of dust go up over the Hope Road bridge overpass. At this time I was going up the slope of the rise and did not see the collision. As I went over the rise, I pulled parallel to the Dodge and went to the car. I saw a male and a female in the front seat. I recognize the male to be the defendant, Richard Starkey. I also saw several beer cans in the Dodge. I then went to the Buick, and opened the door. Mr. McCartney fell out. I saw Mrs. McCartney lying in a pool of blood. I picked up their daughter and walked east with her, facing east so she couldn't see her car. At this point, Starkey came up to me and said, "That son of a bitch was going too slow." I smelled the odor of beer on his breath when he said that.

SCRIPT
Sgt. John Pepper

My name is John Pepper. I am a police sergeant for the City of _____, and have been a policeman for thirteen years. On May 17, 197_, at about 7:05 P.M., I got a radio call regarding an accident on the expressway. I went to the scene and was the first police officer there. After calling for an ambulance, I talked to the defendant. The entire conversation we had, as I recall it, was that I told him I was a police officer, gave him his rights, and I asked him if he was the driver of the Dodge. He said he was. I saw that he was staggering and smelled an odor of beer on his breath; also his eyes were glassy and his speech was slurred. He told me he felt McCartney's car wasn't going fast enough to be on the freeway. The speed limit on the freeway is 55 m.p.h.

I arrested the defendant and transported him to the station for booking. I think he was drunk and I'll bet he had at least twelve to fifteen cans of beer before the accident. He might have even been using drugs.

SCRIPT
Penny Lane

My name is Penny Lane and I live at 303 University Drive, City of _____.

On May 17, 197_, my boyfriend, Richard Starkey, picked me up at my apartment for a dinner date at about four o'clock P.M. We stayed at my apartment for an hour or so. While we were there, Richard had one or two cans of beer, and I drank about three glasses of wine. We were talking and listening to the stereo. Richard mentioned that he had put a new cam in his Dodge and that the car seemed much faster. He said he had raced a Corvette on May 15, after putting the cam in, and that he easily beat the Corvette.

At about five, we went to a local bar on the way out for supper. We stayed there for about an hour and a half. Richard had about two bottles of beer there. It could have been three, but not more than that. I'm not really sure because the place was so busy and part of the time I was playing Foosball while Richard was at the bar. I had three more glasses of wine while we were there. We left there about 6:30. The bar is about two miles from where the accident happened. Richard was driving okay when we left. He was driving a little fast, but wasn't having any trouble. I wasn't paying much attention to the road from the time we left the bar. All of a sudden, Richard yelled "look out!" I looked ahead and saw a green car going slow in front of us. Then there was a noise and I don't remember anything else until a policeman gave me a ride to the hospital. I had a bump on the head and a cut knee. When we left the bar, Richard had a six-pack of beer with him.

SCRIPT
Richard Starkey

My name is Richard Starkey. I live at 5201 College Court, City of _____. I'm employed as a drummer in a rock music group. On May 17, 197_, I was going out on a date with my girlfriend, Penny Lane. I went to her apartment at four or four-thirty that afternoon. We talked for a while and I had a beer while we were there. I don't remember what we talked about, but I do remember that was the first beer or drink I had that day. When we left, we stopped off at a bar in Penny's neighborhood. She was looking for a girlfriend of h[illegible] who wasn't there. We waited for a few minutes. I had a beer or two while we were there. I was completely sober when we left and I wasn't having any trouble driving. I was driving about 65 miles an hour when we got on the expressway. As we approached the Hope Road overpass, I noticed a green Buick going very slow in front of me. I slowed down to 55 or 60 miles an hour. I was in the right lane at this point, and the Buick was in the center lane. I looked back to see if I could swerve into the center lane, looked ahead again, saw the Buick directly in front, yelled "look out!", slammed on the brakes, and hit the Buick.

I was a little dazed after the accident, though I wasn't hurt. I talked to a guy holding a little girl after the accident and I said, "Son of a bitch, was that guy going slow." I also talked to a police officer at the scene but I don't remember what was said. I also don't remember having any beer in the car.

Members of the Jury:

At the close of arguments of counsel, it is the duty of the judge to instruct you upon the principles of law that should govern you in your consideration of the evidence and in reaching your verdict. You will now be given these instructions. It is your duty as members of the jury to take the law as it is given in the judge's instructions and to apply that law to the facts in the case which are properly proven by the evidence, and therefrom arrive at your verdict. It is your duty to exclude from consideration everything except the evidence received on this trial and the law as given to you by these instructions, and from these alone, guided by your soundest reason and best judgment, reach your verdict.

If during the trial of this case I have given, or in the course of giving these instructions I may give, to any member of the jury an impression of my opinion concerning the guilt or innocence of the defendant, I charge you to disregard such impression entirely and decide the issues of fact in this case solely as you view the evidence. You, the jury, are the sole judges of the facts, and the court is the judge of the law only.

1185 HOMICIDE BY INTOXICATED USER OF VEHICLE

Homicide by intoxicated user of vehicle, as defined in Section 940.09 of the Criminal Code of Wisconsin, is committed by one who causes the death of another by the negligent operation or handling of a vehicle while under the influence of an intoxicant.

Before the defendant may be found guilty of homicide by intoxicated user of a vehicle, the State must prove by evidence which satisfies you beyond a reasonable doubt that there were present the following four elements of this offense:

First, that Linda McCartney met her death because of injuries sustained in a collision involving a vehicle being operated by the defendant;

Second, that at the time of the collision, the defendant was under the influence of an intoxicant;

Third, that at the time of the collision, the defendant was operating his vehicle in a negligent manner;

Fourth, that such negligence on the part of the defendant was cause of the death of the said Linda McCartney.

The second element of this offense requires that the defendant was under the influence of an intoxicant. You are instructed that the driver of a motor vehicle is under the influence of an intoxicant when his ability to operate a motor vehicle is materially impaired because of his consumption of an alcoholic beverage, a narcotic drug, or other intoxicating substance.

The third element of this offense requires that the defendant was operating the motor vehicle in a negligent manner. You are instructed that a person is operating a motor vehicle in a negligent manner when he fails to exercise ordinary care in the operation of such vehicle.

The fourth element of this offense requires that the relation of cause and effect exist between the death of Linda McCartney and the driving of his vehicle in a negligent manner by the defendant. You are instructed that a relation of cause and effect exists between such negligence and the death of Linda McCartney when such negligence was a cause of death. There may be more than one cause of death. The negligence of one person alone might produce it, or the acts or omissions of two or more persons might jointly produce it. Before such relation of cause and effect can be found to exist, however, it must appear that the negligence under consideration was a substantial factor in producing the death. That is to say, that it was a factor actually operating and which had substantial effect in producing the death as a natural result.

If you are satisfied beyond a reasonable doubt from the evidence in this case that Linda McCartney met her death because of injuries sustained in a collision involving a vehicle operated by the defendant, that at that time the defendant was under the influence of an intoxicant, that the defendant was then operating his vehicle in a negligent manner, and that such negligence on the part of the defendant was a cause of the death of Linda McCartney, then you should find the defendant Richard Starkey guilty of homicide by intoxicated user of vehicle as charged in the information.

If, however, you are not so satisfied, then you must find the defendant not guilty.

162 AGREED FACTS

When the district attorney and the attorney for defendant stipulate or agree to the existence of a certain fact, you must accept such stipulated or agreed fact as conclusively proved. (In this case, the district attorney and defendant's attorney have stipulated that Linda McCartney died in the collision and that her death resulted from such collision.)

140 BURDEN OF PROOF AND PRESUMPTION OF INNOCENSE

In determining the guilt or innocence of the defendant, you should scrutinize the evidence with the utmost care and caution. You should act with all the judgment, reason, prudence, and discrimination you possess. If, after this scrutiny of all the evidence, you have a reasonable doubt of the defendant's guilt, you must find him not guilty.

The law presumes every person charged with the commission of an offense to be innocent. This presumption attends the defendant throughout the trial and prevails at its close unless overcome by evidence which satisfies the jury of his guilt beyond a reasonable doubt. The defendant is not required to prove his innocence.

The burden of proving the defendant guilty of every element of the crime charged (or submitted for your consideration) is upon the State. Before you can return a verdict of guilty, the State must prove to your satisfaction beyond a reasonable doubt that the defendant is guilty.

If you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant's innocence, you should do so and find him not guilty.

The term "reasonable doubt" means a doubt based upon reason and common sense. It is a doubt for which a reason can be given, arising from a fair and rational consideration of the evidence or want of evidence. It means such a doubt as would cause a man of ordinary prudence to pause or hesitate when called upon to act in the most important affairs of life.

A reasonable doubt is not a doubt which is merely fanciful or speculative, such as a skeptical mind might suggest. A doubt which ignores a reasonable interpretation of the evidence, or which arises merely from sympathy or from fear to return a verdict of guilt, is not a reasonable doubt. A reasonable doubt is not merely a doubt such as may be conjured up in the mind of one desiring to escape the responsibility of a decision.

While it is your duty to give the defendant the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth and give the defendant the benefit of a reasonable doubt if it arises in your minds after you have carefully considered all the evidence in the case.

190 WEIGHT OF EVIDENCE

The weight of evidence is not to be decided merely according to the number of witnesses on each side. You may find that the testimony of one witness is entitled to greater weight than that of another witness, or even of several other witnesses, and you may give it such weight in considering your verdict.

160 ARGUMENTS OF COUNSEL

You should consider carefully the closing arguments of counsel insofar as such arguments will assist you in arriving at a just verdict, but the closing arguments of counsel and their conclusions and opinions are not to be considered by you as evidence in this case. It is your duty to draw your own conclusions and your own inferences from the evidence, and to decide upon your verdict according to the evidence, under the instructions given you by the Court.

515 UNANIMOUS VERDICT AND SELECTION OF FOREMAN

This is a criminal, not a civil case; therefore, before the jury can return a verdict which can legally be received, such verdict must be reached unanimously. In a criminal case all twelve jurors must agree in order to arrive at a verdict.

Let your first duty upon retiring to your jury room be the selection of a foreman or forelady to preside over your deliberations. When you have agreed upon your verdict, have it signed and dated by your foreman or forelady, and all of you return with it to this courtroom while the court is in session.

STATE OF WISCONSIN : COUNTY COURT : _____ COUNTY
BRANCH II

STATE OF WISCONSIN Plaintiff,

-vs-

RICHARD STARKEY Defendant.

V E R D I C T

Case # _____

We, the jury, duly empanelled and sworn to try the above entitled action find the defendant, Richard Starkey, _____ as charged in the _____.

Dated this _____ day of _____ 19___, at _____, Wisconsin.

_____

(Foreman or Forelady)

APPENDIX 13

PROJECT INQUIRY BURGLARY CASE MOCK TRIAL

State of Wisconsin, Plaintiff

v. Script (Revised January, 1976)

Robert Dylan, Defendant

Participants in the trial:

Judge: A local attorney
Prosecutors: Two students selected from the class
Defense Counsel: Two students selected from the class
Jurors: Twelve (optional: six) students from the class
Defendant: Robert Dylan
Police Officer: Michael Jagger
Drugstore Owner: James Hendrix
Drugstore Employee: Grace Slick
Service Station Manager: Marlow Guthrie

Prepared and revised by:
Bryan A. Frame, II
Waukesha, Wisconsin

STATEMENT OF FACTS

The defendant, Robert Dylan, is accused of having burglarized the Hendrix Drugstore, 125 West Main Street, City of _____, Wisconsin, on May 3, 197_. The defendant denies guilt, but admits to having been in the area at the time of the incident. Officer Jagger states that he found the defendant in the vicinity and that the defendant made certain incriminating statements to him. The drugstore owner will establish that a burglary did occur.

The defendant has previously been convicted of misdemeanor theft. Conviction of the offense of burglary could result in imprisonment in the State Prison for a maximum of ten years. The elements of the crime of burglary are as follows: intentional entry into a building, without the consent of the person in lawful possession, with intent to steal or commit a felony. Each element must be proved beyond a reasonable doubt, and may be proved by circumstantial evidence.

At the close of the trial, the judge shall instruct the jury, using Wisconsin Jury Instruction Nos. 100, 1421, 140, 170, 190, 160, and 515 in that order.

SCRIPT

Patrolman Michael Jagger

My name is Michael Jagger. I live at 1422 South Street, City of _____, Wisconsin. I am employed by the City as a patrolman, and have been so employed for two and one-half years. On May 3, 197_, at approximately 11:00 P.M., I was on my usual rounds on Main Street, City of _____. Walking past the Hendrix Drugstore, I noticed through the large front window that the office door was standing open and that mud had been tracked all over the floor. I checked the front door and found it locked. I went to the rear door and found it standing about 1-2 inches open. There were many muddy footprints on the concrete loading dock behind the rear door. The entire block behind the drugstore is under construction and very muddy, as it had rained for about 24 hours before 11:00 P.M., May 3. I drew my gun and entered the rear door. Inside I found many muddy footprints, a broken lock on the office door, pill bottles knocked off the shelf, and the cash register opened. I did not find anyone inside. As I went out the back door, I saw the flash of a match or cigarette lighter on the next street over from Main, one block north of the store. I ran east to the corner of First and Elm Streets, then west along Elm to where the defendant was standing. I observed that he was smoking a cigarette at that time.

I asked him what he was doing there, and he replied, "Fixing my wife's car. The shift linkage came off, and I'm putting it back together." He pointed to a 1967 Ford automobile about ten feet away. The hood on this car was up. I walked over to it and placed my hand on the engine block, which was warm. I asked him what time the car broke down, and he answered, "around 6:00 P.M." I then noticed that his shoes and pants were very muddy. I told the defendant, "I'm placing you under arrest." and gave him his constitutional rights. He then said, "You'll never be able to pin that drugstore burglary on me."

I then placed him in the squad car and radioed for a tow truck for his car. We proceeded to the station, where I inventoried his belongings and placed him in a cell. I took all of his belongings to the squad room and made a list.

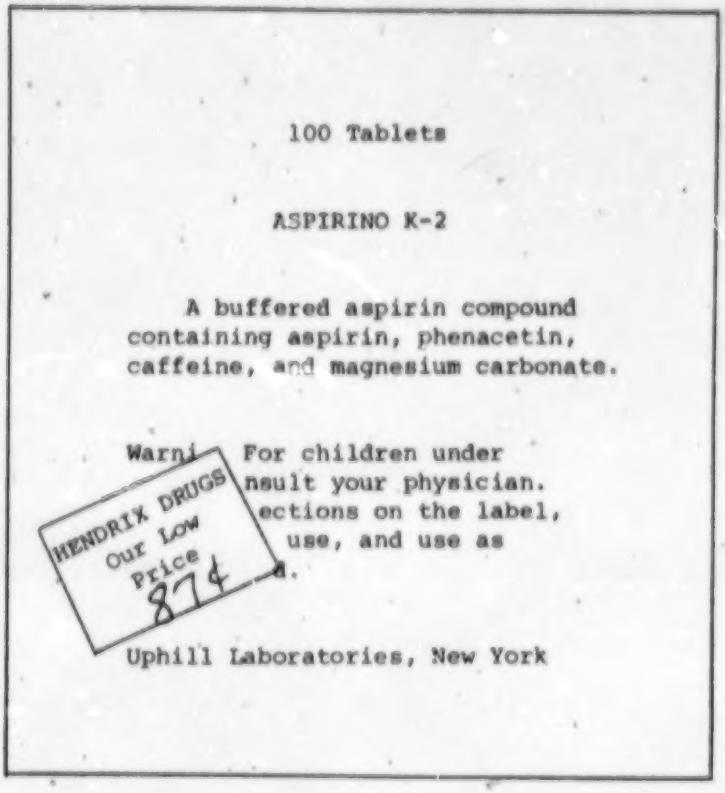
I then returned to the scene at about 2:15 A.M. As soon as I drove up, an unknown male, whose name I did not obtain, told me that he had seen the defendant run up to the Ford about five minutes before I got there and that the defendant had come from the direction of the Hendrix Drugstore.

5-4-7
12:15 P.M.

INVENTORY - DYLAN
Officer Jagger

1. 1 pair man's shoes - brown (muddy)
2. 1 pair man's socks - black (muddy)
3. I pair man's bluejeans - blue (muddy legs)
4. 1 pair man's undershorts
5. 1 man's teeshirt
6. 1 man's pullover sweater - dark blue
7. 1 man's flannel jacket - dark blue
8. 1 belt - black
9. 45¢ loose change
10. three keys on keyring
11. twenty dollar bill
12. man's comb - black plastic
13. 1 package of cigarettes
14. 1 package of matches
15. 1 man's wallet - black
16. 1 bottle of aspirin, in cardboard package, bearing Hendrix label

FRONT PANEL OF ASPIRIN BOX



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SCRIPT

Drugstore Owner James Hendrix

My name is James Hendrix. I live at 422 Yellow Sunshine Court, City of _____, Wisconsin. I am self-employed as the owner of the Hendrix Drugstore, 125 West Main Street, _____, Wisconsin. I have operated this store for ten years. I have four employees. Each employee has his own key. The store's usual hours are 9:00 A.M. until 10:00 P.M., Monday through Saturday. I recall the date of May 3, 197__. On that date, I worked in the store until 4:00 P.M., at which time my employee, Grace Slick, took over. I have always told my employees to lock up both the office and the doors at the end of the day. I'm sure I told Grace to do this on that day. I also have told the employees to take all cash home with them every night at closing, and deposit it in the bank the next morning. On the afternoon of May 4, 197__, Miss Slick phoned me and told me that she had put all the cash register money in a bank bag at 9:45 P.M., as no customers had been in the store for an hour or so. She also said that Mrs. Joplin came in about five minutes later and gave her a twenty dollar bill as payment on her account. Miss Slick also said she had put the twenty dollar bill in the cash register instead of the bank bag.

Also on May 4, 197__, I went to the drugstore and observed muddy footprints all over the floor. I also observed that the cash register was open and empty. I also saw that the rear door was open. I think somebody broke the lock on the rear door and the office door, probably to steal money or drugs.

I do not know the defendant, Robert Dylan, personally, and never gave him consent to enter my drugstore.

SCRIPT

Drugstore Employee Grace Slick

My name is Grace Slick. I live at 1454 Jefferson Place, City of _____, Wisconsin. I am employed by James Hendrix at the Hendrix Drugstore, 125 West Main Street, _____, Wisconsin. I have my own key to the store. On May 3, 197__, I worked from about 4:00 P.M. of that day until about 10:00 P.M. At the end of the day, I put the money in a bank bag. I think I may have left a $20.00 bill in the cash register that night. I am sure that I locked all the doors when I closed up, including the office door.

I do remember having a phone conversation with Mr. Hendrix on the day after the incident but don't remember what was said.

I do not remember seeing the defendant at any time in the Hendrix store on May 3, 197__. I am sure he was not in the store during my shift on that date. I was the only employee on duty on that shift that day.

SCRIPT
Service Station Operator Marlow Guthrie

My name is Marlow Guthrie. I live at 622 Maple, _____, Wisconsin. I am self-employed as the operator of Marlow's Magnificent Motors, a gas station and auto repair center. I also operate a towing service. On May 4, 197__, in the early morning hours, I received a telephone call from the City Police. They said they had caught a burglar and asked me to tow in a Ford. I went to Elm Street, just west of First Street, with my tow truck. At the scene, I found a 1966 Ford automobile. I towed this vehicle to my garage. The shift linkage had come apart, and the car was not operable. I also found some white powder in a plastic bag in the glove compartment which I think was heroin. A shift linkage could come apart this same way if someone jammed the lever into any forward gear in too big a hurry.

SCRIPT
Defendant Robert Dylan

My name is Robert Dylan. I live at 552 East Wilson Street, City of _____, and am employed by Zappa Electronics as an electrician. I am twenty-six years old and have been employed there three years. I am married and have a daughter.

On May 3, 197__, I got home about 6:00 P.M. My wife told me that her car broke down near the corner of First and Elm Streets, in the City of _____. We ate supper and watched television until 10:00 P.M. I then walked over to her car, stopping at Hendrix Drugstore. It was closed when I got there. I didn't have any aspirins with me or in the car. On the way, I crossed through the muddy field bounded by Main, First, and Elm Streets. I worked on the car for a few minutes and decided to take a break. I lit up a cigarette and a few seconds later, a policeman ran up to me. He asked me what I was doing, and I told him I was fixing my wife's car. He told me to put my hands on the car top. He frisked me, and I asked him why. He told me to shut up and said I was under arrest for burglary. I told him I didn't know anything about it. He then told me some rights, put me in his car, and drove me to the station. He gave me some jail clothes and took my clothes and other things. I think I had some loose change and maybe a dollar in my wallet.

I have a criminal record, having been convicted once of misdemeanor theft.

STATE OF WISCONSIN : COUNTY COURT : _____ COUNTY
BRANCH II

STATE OF WISCONSIN Plaintiff,

-vs- V E R D I C T

ROBERT DYLAN Defendant. Case # _____

We, the jury, duly empanelled and sworn to try the above entitled action find the defendant, Robert Dylan, _____ as charged in the matter of burglary.

Dated this _____ day of _____ 19_____, at _____, Wisconsin.

_____

(Foreman or Forelady)

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100 OPENING INSTRUCTION

Members of the Jury:

At the close of arguments of counsel, it is the duty of the judge to instruct you upon the principles of law that should govern you in your consideration of the evidence and in reaching your verdict. You will now be given these instructions. It is your duty as members of the jury to take the law as it is given in the judge's instructions and to apply that law to the facts in the case which are properly proven by the evidence, and therefrom arrive at your verdict. It is your duty to exclude from consideration everything except the evidence received on this trial and the law as given to you by these instructions, and from these alone, guided by your soundest reason and best judgment, reach your verdict.

If during the trial of this case I have given, or in the course of giving these instructions I may give, to any member of the jury an impression of my opinion concerning the guilt or innocence of the defendant, I charge you to disregard such impression entirely and decide the issues of fact in this case solely as you view the evidence. You, the jury, are the sole judges of the facts, and the court is the judge of the law only.

1421 BURGLARY WITH INTENT TO STEAL

Burglary, as defined in section 943.10 of the Criminal Code of Wisconsin, is committed by one who intentionally enters any building or dwelling without the consent of the person in lawful possession and with intent to steal.

Before the defendant may be found guilty of burglary, the State must prove by evidence which satisfies you beyond a reasonable doubt that there were present the following three elements of this offense:

First, that the defendant intentionally entered the Hendrix Drugstore.

Second, that the entry of such drugstore by the defendant was without the consent of the person in lawful possession and that the defendant knew that his entry was without such consent.

Third, that the defendant entered such drugstore with intent to steal.

The first element of burglary requires that the defendant intentionally entered the Hendrix Drugstore.

The second element of this offense requires that the entry of such drugstore by the defendant, if the defendant entered such place, was without the consent of the person in lawful possession, and that the defendant knew that his entry was without such consent. (You are instructed that entry into a place during the time it is open to the general public is with consent.)

The third element of this offense requires that the defendant entered the drugstore with intent to steal, that is, that he had the mental purpose to take and carry away (or retain possession of) movable property of another without his consent and with intent to deprive the owner permanently of possession of such property.

This intent to steal must be formed before entry is made. The intent to steal, which is an essential element of burglary, is no more or less than the mental purpose to steal formed on the instant preceding the entry, or sometime theretofore, which continued to exist at the time of the entry.

You cannot look into a man's mind to find out his intent. While this intent to steal must be found as a fact before you can find the defendant guilty of burglary, it must be found, if found at all, from his acts and his words and statements, if any, bearing upon his intent.

If you are satisfied beyond a reasonable doubt from the evidence in this case that the defendant intentionally entered the Hendrix Drugstore, that the entry of such drugstore by the defendant was without consent of the person in lawful possession, that the defendant knew that he did not have such consent, and that the defendant entered the Hendrix Drugstore with intent to steal, then you should find the defendant guilty of burglary as charged in the information.

If, however, you are not so satisfied, then you must find the defendant not guilty.

140 BURDEN OF PROOF AND PRESUMPTION OF INNOCENCE

In determining the guilt or innocence of the defendant, you should scrutinize the evidence with the utmost care and caution. You should act with all the judgment, reason, prudence, and discrimination you possess. If, after this scrutiny of all the evidence, you have a reasonable doubt of the defendant's guilt, you must find him not guilty.

The law presumes every person charged with the commission of an offense to be innocent. This presumption attends the defendant throughout the trial and prevails at its close unless overcome by evidence which satisfies the jury of his guilt beyond a reasonable doubt. The defendant is not required to prove his innocence.

The burden of proving the defendant guilty of every element of the crime charged (or submitted for your consideration) is upon the State. Before you can return a verdict of guilty, the State must prove to your satisfaction beyond a reasonable doubt that the defendant is guilty.

If you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant's innocence, you should do so and find him not guilty.

The term "reasonable doubt" means a doubt based upon reason and common sense. It is a doubt for which a reason can be given, arising from a fair and rational consideration of the evidence or want of evidence. It means such a doubt as would cause a man of ordinary prudence to pause or hesitate when called upon to act in the most important affairs of life.

A reasonable doubt is not a doubt which is merely fanciful or speculative, such as a skeptical mind might suggest. A doubt which ignores a reasonable interpretation of the evidence, or which arises merely from sympathy or from fear to return a verdict of guilt, is not a reasonable doubt. A reasonable doubt is not merely a doubt such as may be conjured up in the mind of one desiring to escape the responsibility of a decision.

While it is your duty to give the defendant the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth and give the defendant the benefit of a reasonable doubt if it arises in your minds after you have carefully considered all the evidence in the case.

170 CIRCUMSTANTIAL EVIDENCE

The State relies upon circumstantial evidence. Circumstantial evidence is the proof of certain facts from which a jury may logically infer the existence of other facts according to the knowledge or common experience of mankind.

It is not unusual in a criminal case to rely upon circumstantial evidence.

It is true that circumstantial evidence may be so weak as not to meet the standard of proof required. However, circumstantial evidence may be, and often is, stronger and more convincing than direct evidence.

To warrant a conviction on circumstantial evidence, facts necessary for the conclusion sought to be established must be proven by competent evidence beyond a reasonable doubt as that phrase is defined for you in these instructions. These facts must be consistent with each other and with the guilt of the defendant. The circumstances must lead you to conclude beyond a reasonable doubt that the accused committed the offense.

It is not sufficient that the facts simply render probable the guilt of the accused. No other conclusion but that of the guilt of the accused must fairly and reasonably grow out of the evidence.

The weight of evidence is not to be decided merely according to the number of witnesses on each side. You may find that the testimony of one witness is entitled to greater weight than that of another witness, or even of several other witnesses, and you may give it such weight in considering your verdict.

160 ARGUMENTS OF COUNSEL

You should consider carefully the closing arguments of counsel insofar as such arguments will assist you in arriving at a just verdict, but the closing arguments of counsel and their conclusions and opinions are not to be considered by you as evidence in this case. It is your duty to draw your own conclusions and your own inferences from the evidence, and to decide upon your verdict according to the evidence, under the instructions given you by the Court.

515 UNANIMOUS VERDICT AND SELECTION OF FOREMAN

This is a criminal, not a civil case; therefore, before the jury can return a verdict which can legally be received, such verdict must be reached unanimously. In a criminal case, all twelve jurors must agree in order to arrive at a verdict.

Let your first duty upon retiring to your jury room be the selection of a foreman or forelady to preside over your deliberations. When you have agreed upon your verdict, have it signed and dated by your foreman or forelady, and all of you return with it to this courtroom while the court is in session.

APPENDIX 14

Wisconsin Penalties for The Sentencing Game

(Bill of Rights Newsletter, Spring 1975)

Note: These penalties are adapted from the Wisconsin Statutes to fit the facts of cases 1-5)

Case #1: (Jane Carson):

940.20 Battery - $200/6 months
940.22 Aggravated battery - $2500/5 years

Case #2: (Allan Jacobs):

943.32 Armed robbery - 30 years

Case #3: (Dave Riley):

943.32 Armed robbery - 30 years
939.32 Attempt, 943.32 Armed robbery - 15 years
943.23 Operating vehicle without owner's consent - $1000/5 years

Case #4: (Rodney Baker):

940.02 Second degree murder - 5-25 years

Case #5: (John Mitchell):

Conspiracy - not a separate crime in Wisconsin
946.65 Obstructing justice - $5000/2 years
946.31 Perjury - $5000/5 years